No. 89-441

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROSEMARY MENARD-SANFORD, *et al.*,
Petitioners,

v.

A.H. ROBINS COMPANY, INCORPORATED, *et. al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED*

This case arises out of a corporate reorganization by A.H. Robins Company (the "debtor") under Chapter 11 of the Bankruptcy Code, which established a mechanism for satisfying the claims of nearly two hundred thousand women who have been injured by the Dalkon Shield (the "creditors"), an intrauterine device sold by Robins. The courts below approved a reorganization plan creating a trust fund from which the claimants may seek com-pensation. The plan provides that the trust fund is the exclusive source of compensation, and enjoins the creditors from suing Robins' officers, attorneys and other third parties (the "third parties") who allegedly engaged in a conspiracy to suppress information relating to the dangers posed by the Dalkon Shield. The question presented for review is whether:

In a corporate reorganization under the Bankruptcy Code, does a bankruptcy court have the power to enjoin creditors from pursuing additional remedies against third parties who are independently liable to the creditors, where those third parties are not debtors in any bankruptcy proceeding and where the fund created in the reorganization may not be sufficient to pay all creditors in full?

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*In addition to the named petitioner Rosemary Menard-Sanford, the other petitioners are 668 individual claimants who also appealed the order confirming the reorganization plan of respondent A.H. Robins Company, Inc. All of those who were appellants are listed at the conclusion of the opinion of the court of appeals. 20a-38a. Those who have asterisks next to their names have not joined this petition, and hence are respondents in this Court. The other respondents, who were appellees below, include four entities designated by the bankrupcy court — the Creditors' Committee, the Dalkon Shield Claimants' Committee, the Equity Security Holders' Committee, and the Future Claimants' Representative (Stanley K. Joynes, III) — and the court-appointed examiner, Ralph R. Mabey.

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OPINIONS BELOW

The opinion of the court of appeals is reported and appears in the separately bound appendix at 1a -38a at 880 F. 2d 694 . The memorandum of the district court is reported at 88 B.R. 742 (1988) and appears at 55a-82a. The order of confirmation is unreported and appears at 39a-54a .

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1988. 83a-89a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTE

Section 524(e) of the Bankruptcy Code of 1978, Pub. Law 95-598, 92 Stat. 2593, 11 U.S.C. § 524(e), provides as follows:

> Except as provided in subsection (a)(3) of this section [relating to spousal debts], discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

STATEMENT OF THE CASE

On August 21, 1985, respondent A.H. Robins Company, Inc. ("Robins") sought refuge under Chapter 11 of the Bankruptcy Code because of the pendency of thousands of lawsuits against it by women who had been injured by Robins' intrauterine contraceptive device known as the Dalkon Shield. Nearly three years later, the district court, which had jurisdiction under 28 U.S.C. § 1334, approved a reorganization plan under which the Robins' shareholders will receive $700,000,000 in stock of American Home Products ("AHP"), while approximately 195,000 Dalkon Shield victims will be relegated to seeking recovery for their injuries from a trust fund, which, although quite substantial, may be inadequate to satisfy in full all of the Dalkon Shield claims. Indeed, it was precisely because of the risk of underfunding that AHP and Robins insisted upon a ceiling on the damages payable to Dalkon Shield victims. As a result of the plan, the entire risk of inadequate funding has been transferred from Robins' shareholders to Dalkon Shield victims, even though those shareholders will receive AHP stock that is more than 3 1/2 times as valuable as their Robins stock was when the company filed for bankruptcy.

Despite petitioners' serious misgivings about the fairness of the plan and the legality of the method by which it was approved,

at this point they object only to one element of the plan: the injunction barring Dalkon Shield victims from suing Robins' officers and other third parties who are alleged to be joint tortfeasors with Robins. The lower courts upheld this injunction even though the third parties are not debtors under the Bankruptcy Code in this or any other proceeding, the fund may well be inadequate to pay the Dalkon Shield victims in full, and the victims will never have their day in court against these alleged tortfeasors. In order to understand how vital the removal of that injunction is to Dalkon Shield victims, we briefly review the proceedings that led to the plan and then turn to the rationales given by the lower courts to sustain the injunction.

1. Preliminary Proceedings

Robins filed under Chapter 11 to halt thousands of actual and anticipated Dalkon Shield suits pending against it and to enable it to develop a plan to pay for the claims. A major problem was that Robins did not know how many claims might be filed and what amount of damages might have to be paid. Six thousand lawsuits were then pending against it, but the company's greatest potential liability related to injuries caused by Dalkon Shields for which claims had not yet been filed. To gather the necessary information in order to formulate a reorganization plan, a three step process evolved.

First, the court established a bar date for the filing of all claims in order to ascertain the maximum number of eligible claimants (12a). Second, the court sent out a questionnaire to all those who filed claims to gather specific information as to each claimant's injuries (12a -13a). Third, a very detailed questionnaire was sent to approximately 6000 claimants, from which a data base concerning pending claims was prepared.

Using this and other information, the district court held a week-long hearing in November 1987 for the purpose of estimat-

ing the total amount of unliquidated Dalkon Shield claims. Although all parties who participated in the estimation hearing used the same raw data, there was a great divergence in the range of estimates for the total figure. Thus, Robins estimated that the total claims would amount to between $800 million and $1.3 billion; the Equity Security Holders' Committee placed the estimate at $1.03 billion; Aetna Life and Casualty Company — Robins' insurer — gave a figure of between $2.2 and $2.5 billion; and the Dalkon Shield Claimants' Committee provided an estimate of $4.2 billion to $7 billion (63a - 64a).

One reason for these vast differences is that the final figure necessarily incorporated a large number of subsidiary assumptions and determinations. First, the number of women with viable claims had to be estimated, implicating such variables as how many claimants would be eligible and how many would actually seek compensation? Second, the injuries had to be divided into different categories and reasonable ranges of dollar recoveries had to be assigned to each. Those injuries varied in severity from major birth defects and loss of child-bearing capabilities on one end, to minor short-term pelvic inflammation on the other. Third, estimates had to be made of the number of claimants who would fall into each category. Only after those and other subsidiary questions were answered was it possible to obtain a rational estimate for the total claims of all Dalkon Shield victims as a group.

No one suggested that anything but "estimates" could be made for the total or any of its components. But while neither mathematical precision nor a detailed set of figures that would add up to an indisputably correct total was expected, it was plainly reasonable to anticipate not only a total figure, but subtotals for the various components (probably with ranges of figures), together with an explanation of the assumptions used in deriving these components to reflect the major variables. However, the district court simply announced at the conclusion of the

estimation hearing that a payment of "$2.475 billion, payable over a reasonable period of time" would be sufficient to pay all Dalkon Shield claims and related expenses (64a). Despite petitioners' repeated requests for a breakdown of the total, no further explanation was ever provided.

With this figure in hand, Robins was in a position to effect a merger as a means of reorganizing the company. In February 1988, it reached agreement with AHP on a deal, which, for Dalkon Shield victims, had two essential elements. First, a fund was to be created in an amount necessary to satisfy the district court's estimate of $2.475 billion dollars, payable over a reasonable period of time, and that fund was to be the exclusive source of payment to Dalkon Shield victims. Thus, under the plan, neither Robins, which was to go out of existence, nor AHP, nor the subsidiary of AHP into which Robins was to be merged, would have any potential liability after the creation of the fund. This cap on victims' recovery, equal to the amount of the fund, was vital to the management and shareholders of Robins and AHP because everyone recognized that there was a substantial risk that the fund might not be sufficient to pay all the claimants in full. The cap actually chosen was highly beneficial to Robins' stockholders because it assured them $700 million in AHP stock, with no chance of that amount being diminished because of judgments in excess of the fund.

Second, the plan contained a provision, to be implemented by an order of the bankruptcy court, barring all Dalkon Shield victims from suing non-bankrupt third parties for their injuries, even if the fund proved to be insufficient to pay all victims in full.[1] This provision was included because of a fear that many of the victims would assert claims against high officials of

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[1]The plan does not bar suits against doctors, hospitals, and other health care providers for independent acts of negligence.

Robins and the lawyers and law firms representing Robins and its insurer Aetna, based on allegations that these third parties conspired to cover up the cause of the injuries resulting from use of the Dalkon Shield, after the cause was well known to them. Such claims, which included allegations that some of those persons committed perjury, destroyed incriminating documents, and otherwise obstructed justice, are independent of any liability that Robins has for selling defective Dalkon Shields. Thus, the victims contended that, as a result of the conspiracy to suppress this vital safety information, the factual support for which is more fully discussed *infra* at 14-15, Dalkon Shields were not removed from thousands of women, and therefore many women suffered serious bodily injuries that would have been avoided if the truth about the dangers of the Shield had not been suppressed. None of these alleged conspirators who benefit from the injunction was a debtor in this or any other proceeding under the Bankruptcy Code, and, with the exception of Aetna, against which a separate action had been brought, none of them was a defendant in a pending suit by a Dalkon Shield claimant. Nonetheless, the effect of this part of the plan was to release all of these third parties from any potential liability to any of the victims, even if the fund proved insufficient to pay the claims in full. Among the principal beneficiaries of this provision are E. Claiborne Robins Sr. and E. Claiborne Robins, Jr., whose families together own 42% of Robins' stock.[2]

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[2]Aetna is also alleged to be a co-conspirator with these individuals, but Aetna was a defendant in a class action that was settled at the same time that the plan was confirmed, and which was decided by the Fourth Circuit on the same day as this case. *See Breland v. Aetna Casualty & Surety Co.*, Nos. 88-1755, 88-1766 ,88-3604, and 88-1757. The court of appeals captioned its opinion "In Re A.H. Robins Company, Incorporated" even though Robins was never a party to that case. A petition for a writ of certiorari is being filed in *Breland* under the caption *Anderson v. Aetna Casualty & Surety Co*. The relation between the two cases is discussed in the *Anderson* petition at 10-11, 15 & N6.

2. Decisions Below

In order to confirm the reorganization plan, the district court had to approve a disclosure statement explaining the plan to all creditors. The creditors in each class then had to vote to approve the plan, and the district court had to make findings that the plan met all the requirements of the Bankruptcy Code.

On July 18, 1988, the district court held a one-day confirmation hearing on the plan. At the outset of the hearing, Robins provided the vote totals indicating that all classes of creditors, including the Dalkon Shield claimants, had approved the plan by wide margins (71a). A week later the court issued its order approving the plan, along with an accompanying memorandum (39a, 53a). The memorandum set forth the history of the litigation and went through each of the Bankruptcy Code's requirements for confirmation, explaining briefly how they had been satisfied. It did not, however, respond to the principal objections made both in writing and at the hearing, in particular those based on the court's failure to provide the breakdown of the component figures used to determine the total Dalkon Shield claims estimate. In addition, the court defended the injunction against third party actions on grounds of necessity (80a - 81a), without attempting to explain the basis for it under the Bankruptcy Code or how the victims could be deprived of a potential remedy without having their day in court against these third parties.

More than six months after oral argument, the court of appeals unanimously affirmed the decision below, just as it did in three other related cases decided the same day. Petitioners had challenged the plan's disclosure statement on the ground that it failed to include even estimates of the range of recoveries that Dalkon Shield victims might expect to receive, which was the most important information that they needed in deciding whether or not to support the plan. The court rejected that argument by claiming that "specific estimates may well have been more

confusing than helpful and certainly would be more calculated to mislead" — an assertion never made by the district court. (8a). Moreover, the court did not respond to petitioners' point that if the information were sufficiently reliable for the district court to use in estimating the total of all Dalkon Shield claims, then it surely was sufficiently reliable to be sent to claimants so that they could make a more informed choice about whether or not to approve the plan.

Petitioners also claimed that the district court violated 11 U.S.C. § 1126(c), which mandates weighted voting, by assigning the value of $1 to each Dalkon Shield claim, even though the figures offered by Robins at the estimation hearing for different categories of injuries ranged from $750 to $258,000, with by far the largest number of claimants bunched in the two categories having the lowest values. Instead of answering petitioners' legal argument, the court of appeals decided that any error was "harmless" (9a), in light of the overwhelming vote in favor of the plan, without explaining why it was entitled to make an essentially factual finding never attempted by the district court. Petitioners also objected to the failure of the district court to break out the components of the $2.475 billion figure (10a), making it impossible for them to challenge it at the hearing or on appeal. The court overruled that objection by doing precisely what petitioners alleged the district court should have done, but failed to do: explain in detail one way that the court could have arrived at that $2.475 billion total.

Finally, on the validity of the injunction against suing third parties, the court declined to adopt the reasoning of Robins (and the similar approach of the district court) (14a), but instead began by discussing its decision in *Breland*, issued the same day, in which only Aetna, and not Robins or any other person who was potentially liable, was a defendant. According to the court, as a result of its affirmance in *Breland*, "the injunction complained of has no real effect on the rights of class A [which includes

petitioners and all other claimants who filed on time] and the members of Class B who have not exercised their right to opt-out" (16a). While it is true that the affirmance in *Breland*, if upheld by this Court, would have such an effect on all claims against Aetna, the court cited nothing in the record to support its assertion that *Breland* had any bearing whatsoever on the claims of petitioners against persons other than Robins or Aetna who were not parties either to *Breland* or to this bankruptcy proceeding.[3]

The court also sought to defend its decision on a variety of other grounds, including that bankruptcy courts are courts of equity (17a), without explaining how that doctrine can insulate persons not before the bankruptcy court. Eventually, the court reached petitioners' principal allegation that 11 U.S.C. § 524(e) prohibits the injunctions because, with an exception not relevant here, it provides that "discharge of the debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." After referring to two contrary authorities cited to it by petitioners, the court quoted *dicta* from *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987) (18a), that suggested a possible narrowing construction of the plain language of section 524(e), but which did not adopt that construction because it found against the challenging party on other grounds. Nonetheless, the Fourth Circuit found "the language used by the Fifth Circuit persuasive" (19a), and concluded that it did not believe that section 524(e) "must be literally applied in every case as a prohibition on the power of the bankruptcy courts [to issue injunctions barring suits against third parties], as appellants would have us apply it here" (*id*). It then asserted that this case was distinguishable from those cited by

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[3]Much of the court's discussion focuses on claimants who are in Class B in *Breland* because they filed late claims in the reorganization proceeding. However, since petitioners all filed timely claims, that discussion is irrelevant to this case.

petitioners because here the plan was overwhelmingly approved and it "gives a second chance for even late claimants to recover" a factor that does not help petitioners, all of whom filed on time.

Finally, the court relied on the central element of the district court's apparent rationale of "authority by necessity."(180a-81a) that appears to occupy a similar place in the court of appeals' ruling: the injunction is valid because "the entire reorganization hinges on the debtor being free from indirect claims such as suits against parties who would have immunity or contribution claims against the debtor . . ."19a. In those circumstances, the court concluded, "the equitable power of the bankruptcy court to enjoin the questioned suits" was not limited by section 524(e), even though these third parties were not before the bankruptcy court in this or any other proceeding. (*Id.*).

REASONS FOR GRANTING THE WRIT

THE RULING BELOW CONFLICTS WITH DECISIONS OF THREE COURTS OF APPEALS AND PRESENTS AN IMPORTANT QUESTION UNDER THE BANKRUPTCY CODE.

The court of appeals first attempted to defend the injunction against third party suits on the ground that, because all the claimants would be paid in full, they would not be harmed. If that premise were correct, it might justify this Court in declining to hear the case, or it might be a basis for denying relief in a suit against a third party, but it would not provide any basis for validating an order which the district court had no power to issue in the first place.

But it is plain that the court of appeals' assumption that there is a guarantee of full payment is in error. As the plan and disclosure statement, including a portion previously cited by the

court of appeals itself make clear, there is a substantial likelihood that all the Dalkon Shield victims will not be paid in full, and that, therefore, suits against third parties may be the only way in which to make the claimants whole. Indeed, Robins' insistence on the injunction eliminating possible suits against third parties, who include officers and attorneys for Robins, as part of the plan, underscores the substantial risk of nonpayment, which the plan placed entirely on the claimants. And the fact that the court of appeals went on to offer other reasons to sustain the injunction confirms the view that even the court was not convinced that the objections to the injunction were purely theoretical and would have no impact on the ability of the victims to collect their claims in full.

The court of appeals recognized (18a) that two other circuits have construed section 524(e) to forbid bankruptcy courts, as part of corporate reorganizations, from eliminating the liability of third parties, such as their corporate officers, for debts for which the corporation is principally liable. *See Underhill v. Royal*, 769 F.2d 1426, 1432 (9th Cir. 1985), and *Union Carbide Corp. v. Newboles*, 686 F.2d 593 (7th Cir. 1982); *see also United States v. Stribling Flying Service, Inc.*, 734 F.2d 221, 223 (5th Cir. 1984) (denying protection to corporate guarantors and discussing pre-1978 cases to same effect). But the Fourth Circuit then relied on *dicta* from the Fifth Circuit's opinion in *Republic Supply Co.*, suggesting that section 524(e) was not as firm as the rulings in the other cases suggested, and it forged an exception based on three factors, not appearing in the statute or in any other authority: the overwhelming vote in favor of the plan, the fact that late claimants are given a second chance, and the assertion that the success of "the entire reorganization hinges on" the inclusion of the injunction (19a). Because that construction of section 524(e) departs from settled law and creates a conflict in the circuits, as well as an enormous loophole through which nondebtors could readily pass and be financially cleansed in the

process, this Court should grant review.

Despite the efforts of the Fourth Circuit to avoid the conflict by asserting that it would "leave questions concerning cases in which § 524(e) does apply for another day" (19a), the conflict is direct because the other cases are identical in all relevant respects. Either bankruptcy courts have the power to eliminate the liability of third parties who are not before the court and who have never been sued on these claims by the creditors of a bankruptcy estate, or they do not. *Underhill* and *Union Carbide* are clear that section 524(e) specifically denies bankruptcy courts that power. A third case cited to the court of appeals by petitioners, but not mentioned by it, *United States v. Huckabee Auto Co.*, 783 F.2d 1546 (11th Cir. 1986), is even more directly on point. There the debtor owed social security and withholding taxes that were scheduled to be paid in full to the Internal Revenue Service as part of the reorganization. Nonetheless, the IRS also assessed two of the company's officers for the unpaid taxes under 26 U.S.C. § 6672, but the bankruptcy court enjoined the IRS from collecting on those assessments on the ground that "payment of the penalty [under § 6672] would adversely affect the corporate debtor's efforts to reorganize." *Id.* at 1547. However, both the district court and the court of appeals overturned that injunction on the grounds that section 524(e) denies the bankruptcy court the power to eliminate such liabilities—precisely the power which the court of appeals upheld here.[4]

Beyond these stark conflicts, the rationales offered by the court of appeals are either irrelevant or would create an excep-

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[4]Two other courts of appeals have also denied bankruptcy courts the power to enjoin the IRS from collecting taxes under section 6672, albeit in different procedural settings and based on different rationales. *In Re Brandt-Airflex Corp.*, 843 F.2d 90 (2d Cir. 1988); *Matter of La Salle Rolling Mills, Inc.*, 832 F.2d 390 (7th Cir. 1987). *But see id.* at 392 n.6, questioning the government's expansive reading of *Huckabee*, *supra*.

tion that would swallow section 524(e). Thus, the fact that a high percentage of claimants voted in favor of a plan cannot increase the power of the bankruptcy court to issue an injunction not authorized by Congress. Even if those claimants who did not object are barred from suing third parties, on a theory of consent like that adopted in *Republic Supply*, *supra*, that theory would be irrelevant for petitioners who vigorously opposed the injunction in both the district court and the court of appeals.

The final ground asserted by the court — that "the entire reorganization hinges on the debtor being free from indirect claims" — is precisely the argument rejected by the Eleventh Circuit in *Huckabee*, *supra*, as "irrelevant." 683 F.2d at 1549. Indeed, the rationale of the Fourth Circuit has no limiting principles, since in almost any case the debtor could plausibly assert that the reorganization "hinges" on such an injunction. Thus, even if there were no conflict, the validity of the rationale offered for this exception to section 524(e) would present a sufficiently important question to merit this Court's consideration.

Three other factors further support review. First, the effect of the injunction is to deny Dalkon Shield victims the opportunity ever to go to court against third parties who were not part of this or any other bankruptcy proceeding. Such a denial would deny the claimants a property right without due process of law. *See Martin v. Wilks*, 109 S. Ct. 2180 ,2184 (1989), and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Indeed, the Third Circuit recently held that it would violate due process for a federal court in Pennsylvania to enjoin Arizona claimants from pursuing their claims in Arizona state courts, even though the claimants had unsuccessfully attempted to opt out of the class certified by the Pennsylvania court and the settlement of the Pennsylvania action had been upheld on appeal. *In Re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d 760 (1989), *cert. pending sub nom, Chicago Title Insurance Co.*

v. Tuscon Unified School District, No. 88-2050, filed June 15, 1989. In light of these decisions, it would surely offend due process to allow a bankruptcy court to wipe out independent causes of actions that creditors have against parties who are not before the bankruptcy court, solely because the creditors filed a claim in the bankruptcy proceeding. Therefore, section 524(e) should not be construed to authorize any such unconstitutional deprivation in the absence of the clearest indication that Congress intended to do so. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979).

Second, although the injunction provision of the reorganization plan specifically excluded Aetna, that exclusion was entirely gratuitous under the theory adopted by the court of appeals. Thus, if potential lawsuits by Dalkon Shield victims against officers, directors, and attorneys of Robins can be eliminated before they have even been filed, there is no reason why similar claims against Aetna could not have been obliterated in the same way. If a bankruptcy court has the power in one situation, surely it has the power in the other. The scope of this breath-taking addition to the power of the bankruptcy court is a further reason why this Court should grant review on the legality of this injunction.

Third, the injunction is likely to have significant practical impact on the ability of Dalkon Shield claimants to recover fully on their claims, because there is solid evidence to support the conspiracy and the putative defendants would be in a position to make substantial payments. As to the evidence, the Court need look no further than the petition for a writ of certiorari filed by Robins in an attempt to block a grand jury subpoena involving the same conspiracy that is immunized by the plan's injunction. *In Re Grand Jury Proceedings, Company X v. United States*, No.

88-1243, *cert. denied*, 109 S.Ct. 3214 (1989).[5] Based on an *in camera* submission, which included a sworn declaration of a Justice Department attorney and grand jury exhibits and testimony, *id.* at 10a, plus the rulings of other judges in other cases involving Robins, the district court found that there is "a strong *prima facie* showing that [Company X] and its employees and officers participated in the commission of crimes and fraud during the promotion, marketing and sale of [the Product], and used its attorneys to perpetuate and cover up the ongoing crimes and fraud during the ensuing product liability litigation through the commission of frauds on the court, obstruction of justice and perjury." *Id.* at 11a (brackets in petition). *See also* Brief in Opposition of United States in 88-1243, at 2 (listing crimes under investigation) and 3 (reciting representation by Justice Department attorney that evidence before grand jury showed that Robins "had been engaged in ongoing criminal and fraudulent activity for roughly 15 years and had used its attorneys to further and cover up these illegal activities in the nationwide product liability litigation.") It is the civil damages caused by the criminal activity of those individuals that the injunction immunizes.[6]

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[5]There is no doubt that "Company X" is Robins. Aside from X's own description of the background of the case set forth on pages 2-5 of its petition, the district court opinion refer to other cases where similar conclusions of wrongdoing were reached as support for its finding that an exception to the attorney-client privilege existed. Pet. App 10a-11a. The court then cited those decisions in its opinion. While X redacted the name of the company in those cites, the reported decisions themselves, which it did cite, contain the name A.H. Robins, resolving any doubt about the identity of Company X.

[6]A detailed discussion of the Robins' coverup is also contained in the lengthy opinion of the Kansas Supreme Court upholding substantial actual and punitive damages in *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210 (Kan. 1987). After setting out the evidence, the court observed that no court "has ever been presented with corporate misconduct of such gravity and duration," *id.* at 1239, misconduct which can only have been undertaken by individuals, and not inanimate entities like corporations.

Nor is this a situation where the wrongdoers are judgment-proof. Two of the Robins' officers who are potential defendants are E. Claiborne Robins Sr. and E. Claiborne Robins Jr., whose families own 42% of Robins' stock. If the plan is implemented, that interest alone will be worth roughly $300 million. While the lawyers and law firms who are alleged co-conspirators may not be as well-off financially, they and their insurance carriers can surely make significant contributions toward compensating the victims for their injuries. But unless the injunction is lifted, no victim will ever have her day in court against those individuals whose criminal activities caused so many women serious personal injuries. That result, which the Fourth Circuit approved, should not go unreviewed by this Court.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROSEMARY MENARD-SANFORD, *et al.*,
Petitioners,

v.

A.H. ROBINS COMPANY, INCORPORATED, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 88-1750

IN RE: A. H. ROBINS COMPANY, INCORPORATED,

Debtor,

ROSEMARY MENARD-SANFORD; KAREN VALENZUELA; CONSTANCE MILLER ENGELSBERG; NANCY LAURI ADAMS; CAROLYN HARRIS,

Claimants-Appellants,

versus

RALPH R. MABEY; THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; THE OFFICIAL UNSECURED CREDITORS COMMITTEE OF A. H. ROBINS COMPANY, INCORPORATED; STANLEY K. JOYNES, III, Legal Representative of the Future Tort Claimants of A. H. Robins Company, Incorporated,

Parties-in-interest,

A. H. ROBINS COMPANY, INCORPORATED,

Debtor-Appellee.

No. 88-1754

IN RE: A. H. ROBINS COMPANY, INCORPORATED,

Debtor,

DONNA OBERG, et al,

Claimants-Appellants,

versus

THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; THE OFFICIAL UNSECURED CREDITORS COMMITTEE OF A. H, ROBINS COMPANY, INCORPORATED; STANLEY K. JOYNES, III, Legal Representative of the Future Tort Claimants of A. H. Robins Company, Incorporated,

Parties-in-interest,

A. H. ROBINS COMPANY, INCORPORATED,

Debtor-Appellee.

No. 88-1756

IN RE: A. H. ROBINS COMPANY, INCORPORATED,

Debtor,

ALBERT L. SIVLEY,

Claimant-Appellant,

versus

THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; THE OFFICIAL UNSECURED CREDITORS COMMITTEE OF A. H. ROBINS COMPANY, INCORPORATED; RALPH R. MABEY; STANLEY K. JOYNES, III, Legal Representative of the Future Tort Claimants of A. H. Robins Company, Incorporated,

Parties-in-interest,

A. H. ROBINS COMPANY, INCORPORATED

Debtor-Appellee.

No. 88-1758

IN RE: A. H. ROBINS COMPANY, INCORPORATED,

Debtor,

DIANA BROSCO; CATHERINE CRAWFORD; MARY FISCHER, et al,

Claimants-Appellants,

versus

THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; THE OFFICIAL UNSECURED CREDITORS COMMITTEE OF A. H. ROBINS COMPANY, INCORPORATED; RALPH R. MABEY; STANLEY K. JOYNES, III, Legal Representative of the Future Tort Claimants of A. H. Robins Company, Incorporated,

Parties-in-interest,

A. H. ROBINS COMPANY, INCORPORATED,

Debtor-Appellee.

No. 88-1759

IN RE: A. H. ROBINS COMPANY, INCORPORATED,

Debtor,

LYNN SCOTT; CAROL LOPEZ, et al,

Claimants-Appellants,

versus

THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; THE OFFICIAL UNSECURED CREDITORS COMMITTEE OF A. H. ROBINS COMPANY, INCORPORATED; RALPH R. MABEY; STANLEY K. JOYNES, III, Legal Representative of the Future Tort Claimants of A. H. Robins Company, Incorporated,

Parties-in-interest,

A. H. ROBINS COMPANY, INCORPORATED,

Debtor-Appellee.

No. 88-1760

IN RE: A. H. ROBINS COMPANY, INCORPORATED,

Debtor,

ELAINE CUMLEY; LAURA JONES; JEAN ABAD, et al,

Claimants-Appellants,

versus

THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; THE OFFICIAL UNSECURED CREDITORS COMMITTEE OF A. H. ROBINS COMPANY, INCORPORATED; RALPH R. MABEY; STANLEY K. JOYNES, III, Legal Representative of the Future Tort Claimants of A. H. Robins Company, Incorporated,

Parties-in-interest,

A. H. ROBINS COMPANY, INCORPORATED,

Debtor-Appellee.

No. 88-1763

IN RE: A. H. ROBINS COMPANY, INCORPORATED,

Debtor,

ALEXIA ANDERSON, et al,

Claimant-Appellant,

versus

STANLEY K. JOYNES, III, Legal Representative of the Future Tort Claimants of A. H. Robins Company, Incorporated; THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; THE OFFICIAL UNSECURED CREDITORS COMMITTEE OF A. H. ROBINS COMPANY, INCORPORATED; RALPH R. MABEY,

Parties-in-interest,

A. H. ROBINS COMPANY, INCORPORATED,

Debtor-Appellee.

No. 88-3602

IN RE: A. H. ROBINS COMPANY, INCORPORATED,

Debtor,

ALEXIA ANDERSON, et al,

Claimant-Appellant,

versus

THE OFFICIAL UNSECURED CREDITORS COMMITTEE OF A. H. ROBINS COMPANY, INCORPORATED; THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; RALPH R. MABEY; STANLEY K. JOYNES, III, Legal Representative of the Future Tort Claimants of A. H. Robins Company, Incorporated,

Parties-in-interest,

A. H. ROBINS COMPANY, INCORPORATED,

Debtor-Appellee.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., Senior District Judge. (CA 85-01307-R)

Argued December 6, 1988 Decided June 16, 1989

Before RUSSELL, WIDENER, and CHAPMAN, Circuit Judges.

Alan B. Morrison (Linda Donaldson, PUBLIC CITIZEN LITIGATION GROUP, on brief) for Appellants. James Crawford Roberts (James S. Crockett, Jr., MAYS & VALENTINE; Dennis J. Drebsky, Alesia Ranney-Marinelli, Kirk C. Loos, SKADDEN, ARPS, SLATE, MEAGHER & FLOM; Ralph D. Pittle, MEDICAL LEGAL CONSULTANTS OF WASHINGTON; John T. Baker, BRAGG & DUBOFSKY; Joseph McDowell, III, CULLITY, KELLEY & McDOWELL; W. Bradley Post, POST, SYRIOS & BRADSHAW; Frederic A. Bremseth, DOSHAN, LORD & BREMSETH; Murray Drabkin, CADWALADER, WICKERSHAM & TAFT; Harold S. Novikoff, WACHTELL, LIPTON, ROSEN & KATZ; Henri E. Norris; Stanley K. Joynes, III, RILEE, CANTOR, ARKEMA & EDMONDS; Robert M. Miller, BERLACK, ISRAELS & LIBERMAN; John S. Kinzey, Jr., Steven J. McCardell, LEBOEUF, LAMB, LEIBY & MACRAE, on brief) for Appellees.

WIDENER, Circuit Judge:

On July 26, 1988, the bankruptcy court and the district court jointly confirmed the "Sixth Amended and Restated Plan of Reorganization" (the Plan) submitted by A. H. Robins Company, Inc. (Robins). *In Re A. H. Robins Co, Inc.*, 88 B.R. 742 (E.D. Va. 1988). Rosemary Menard-Sanford and certain other personal injury claimants, who voted against the Plan, appeal. They challenge the district court's approval of the disclosure statement, the district court's use of a one claimant one vote voting procedure, the district court's feasibility finding, and a certain injunction found in the Plan. We affirm.

On August 21, 1985, Robins filed a petition for reorganization relief under Chapter 11 of the Bankruptcy Code. For an explanation of the details surrounding Robins' bankruptcy and some of the resulting litigation, see the district court's opinion in *In Re A. H. Robins Co., Inc.*, 88 B.R. 742 (E.D. Va. 1988), and our other published opinions regarding this bankruptcy.[1]

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[1]*In Re A. H. Robins Co. Inc.*, 88-1753 (heard Dec. 6, 1988)(4th Cir. 1989); *In Re A. H. Robins Co. Inc.*, 88-1755(L) (*Breland* settlement)

(footnote continued)

On April 1, 1988, the district court approved the "Sixth Amended and Restated Disclosure Statement". The appellants argue that the disclosure statement does not contain adequate information. 11 U.S.C. § 1125(b) requires that before solicitation of approval or disagreement of a plan of reorganization the disclosure statement must contain "adequate information" and be approved by the court. 11 U.S.C. § 1125(a)(1) defines "adequate information" as "information of a kind and in sufficient detail as far is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan." The determination of whether the disclosure statement has adequate information is made on a case by case basis and is largely within the discretion of the bankruptcy court. *In the Matter of Texas Extrusion Corp.*, 844 F.2d 1142, 1157 (5th Cir. 1988), cert denied 57 U.S.L.W. 3313 (1988). The challenged disclosure statement began its 261 pages of information with a thorough summary of the complex plan in terms that almost anyone could understand. It explained, among much more, the

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(heard Dec. 6, 1988)(4th Cir. 1989); *In Re A. H. Robins Co. Inc.*, 862 F.2d 1092 (4th Cir. 1988); *In Re A. H. Robins Co. Inc.*, 846 F.2d 267 (4th Cir. 1988); *Maressa v. A. H. Robins Co. Inc.*, 839 F.2d 220 (4th Cir. 1988), cert denied, 57 U.S.L.W. 3231 (1988); *Grady v. A. H. Robins Co. Inc.*, 839 F.2d 198 (4th Cir. 1988), cert dismissed, 57 U.S.L.W. 3186 (1988); *Official Committee of Equity Security Holders v. Mabey*, 832 F.2d 299 (4th Cir. 1987), cert denied, 56 U.S.L.W. 3647 or 3 [sic] (1988); *Beard v. A. H. Robins Co. Inc.*, 828 F.2d 1029 (4th Cir. 1987; *In Re A. H. Robins Co. Inc.*, 828 F.2d 1023 (4th Cir. 1987), cert denied, 56 U.S.L.W. 3648 (1988); *Committee of Dalkon Shield Claimants v. A. H. Robins Co. Inc.*, 828 F.2d 239 (4th Cir. 1987); *Van Arsdale v. Clemo*, 825 F.2d 794 (4th Cir, 1987); *Vancouver Women's Health Soc. v. A. H. Robins Co. Inc.*, 820 F.2d 1359 (4th Cir. 1987); *In Re Beard*, 811 F.2d 818 (4th Cir. 1987); and *A. H, Robins Co. Inc. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986), cert denied, 479 U.S. 876 (1986). See addendum for listing of parties and Dalkon Shield claim numbers.

amount to be put into trust and made available for the payment of claims, the various estimates of how much money was required, a warning that the funds furnished to pay the estimates might not be enough to pay all claims in full, the sources of funding, an explanation of the various funding provisions which depended on the outcome of various appeals, how claims would be handled, the four options for processing claims and the background of the case. The disclosure statement continued with a discussion of the Robins company, the Dalkon Shield, various litigation regarding the Dalkon Shield, the reorganization, the proposed merger with American Home Products Corporation (AHP), the historical stock values of both AHP and Robins, and federal income tax consequences. The final part of the disclosure statement contains actual copies of the Plan, the Claimants Trust Agreement, the Other Claimants Trust Agreement, the Claims Resolution Facility, the Merger Agreement, Aetna's additional insurance policy, AHP's Annual Report, the Liquidation Analysis and biographies of the proposed Trustees.

The appellants contend that the disclosure statement is misleading because it contains a statement that in order to approve the Plan the district court must make a finding that the Plan contains enough money to satisfy all claims in full. They point out that in reality there may not be enough money to cover all claims. The disclosure statement, however, makes that clear to the claimants. It states that "if the Court's estimate turns out to be too low, Robins will not have to make any more money available to pay claims. In addition, the Plan would generally take away your right to recover for Dalkon Shield injuries against any other parties." The disclosure statement later repeats that thought in explicit terms: "[e]stimation is not an exact science. The money available to pay Dalkon Shield claims may prove to be more or less than the actual value of such claims. If the estimation decision underestimated

the value of the claims, there may not be enough money for the Claimants Trust to pay all claims in full." Thus, we think appellants' contention is without merit.

The appellants' principal challenge to the disclosure statement, however, is that it is inadequate because it does not contain ranges of recovery for claimants with specified injuries. The disclosure statement notes that "[t]here is no certain way to predict the amount that you could receive under option 3. Each claim is different, Factors that affect the value of a claim include the nature of the injury, the medical evidence available to prove the injury, the medical evidence to prove Dalkon Shield use, the presence of other causes of your injury, how long ago you were injured, and what steps you took to enforce your legal rights after your injury became apparent." There is no requirement in case law or statute that a disclosure statement estimate the value of specific unliquidated tort claims. In fact, with so many various unliquidated personal injury claims which vary so much in the extent and nature of injury, medical evidence and causation factors, any specific estimates may well have been more confusing than helpful and certainly would be more calculated to mislead. Given the quantity and quality of the information in the disclosure statement we can not say that the district court abused its discretion in finding that it contained "adequate information."

The appellants next challenge the legality of the voting procedure used to confirm the Plan. The difficulty surrounding the voting procedure resulted from the 195,000 unliquidated claims for personal injuries (Dalkon Shield Claims). The controlling legal provisions for the reorganization include 11 U.S.C. § 1126(a) which provides that a "holder of a claim or interest allowed under section 502 of this title" is entitled to vote on the acceptance of a plan. 11 U.S.C. § 502(a) provides that a claim filed "is deemed allowed unless a party in interest"

objects. Robins objected to all the Dalkon Shield Claims. B.R. 3018(a) provides that "[n]otwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan." The district court, after notice and a hearing, ordered that, for purposes of voting, each Dalkon Shield Claim was estimated and allowed to be equal. It found, fully supported by the record, that any attempt to evaluate each of the 195,000 individual claims for voting purposes would cause intolerable delay. The challenge to the voting procedure relies on 11 U.S.C. § 1126(c) which requires that for a plan to be approved by a class the creditors "that hold at least two-thirds in amount and more than one-half in number" accept the plan. The argument is that § 1126(c) requires use of a weighted voting method which estimates the value of the claims and gives larger claims more votes.

We do not decide whether the district court's voting procedure violated § 1126(c) because, in view of the outcome of the vote, the challenged procedure was at most harmless error. 139,605 claimants voted. Of that 131,761 (94.38%) voted in favor of the Plan. In *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 641-647 (2d Cir. 1988),[2] the district court, faced with 52,440 unliquidated personal injury claims, assigned each claim the value of one dollar for voting purposes. 95.8% of those claims voted to approve the plan. The Second Circuit in reviewing the decision did not decide whether the equal voting plan was error and decided instead that the alleged irregularities were at most harmless error. Given that 94.38%

[2]We have previously noted the "striking similarity both factually and on the legal issues" of the *Robins* and *Johns-Manville* cases. *A. H. Robins Co. Inc. v. Piccinin*, 788 F.2d 994, 1007 (4th Cir. 1986), cert denied, 479 U.S. 876 (1986).

of the Dalkon Shield Claimants voted for the Plan, we hold that, at most, harmless error was committed.[3]

Appellants' next point on appeal is that the district court erred in finding that the Plan complied with 11 U.S.C. § 1129(a)(7)(A)(ii) which requires that an impaired class of claims such as the Dalkon Shield claimants must "receive. . . under the Plan. . .property of a value . . .that is not less than the amount that. . .[they would] receive. . .if the debtor were liquidated under Chapter 7" and § 1129(a)(11) which requires that confirmation is not likely to be followed by liquidation or the need for further reorganization. This latter is called the feasibility requirement.

Both such complaints are based on the "same source: the failure of the district court to break out the components of the $2.475 billion figure." The argument is that since the figure was not broken down, if it turned out to be too low, then the Plan would not be feasible because it could not pay all the claimants in full, which, as the appellants note, is an assump-

[3]We are not persuaded by the argument that the 5.62% NO votes were from the claimants with the largest claims, that being necessary of course to make up more than one-third of the claims in amount. The argument goes that such claimants have the most to gain from a rejection of the plan, but that proposition, we think, is not only supported by no evidence, it is not supported by logic, and is no more likely than the fact that the largest claimants have the most to lose by a rejection of the Plan. Indeed, it would seem that the latter is the more likely if one must choose between the two. Appellants take no exception to the findings of the district court that the liquidation value of the company is considerably less than its value in reorganization, and the part allocated to the claims of the Dalkon Shield claimants is considerably less, $2.5+ billion under the Plan as opposed to $1.6+ in liquidation. So, with a rejection of the Plan which resulted in liquidation, the largest claimants would be the biggest losers. We remain convinced, in view of the 94.38% affirmative vote, that had a weighted voting system been practicable and utilized, the required two-thirds in amount would have approved the Plan. It follows that the error, if any, is harmless.

tion of the Plan and the disclosure statement. The appellants thus complain about the same fact again, except in slightly different context. In all events, we think there is no merit to the claim, but that the care the district court took in arriving at its estimate deserves mention.

The challenged findings are based on an estimation process that the district court undertook as a result of our decision in *A. H. Robins Co., Inc. v. Piccinin*, 788 F.2d 944, 1013 (4th Cir. 1986), cert denied 479 U.S. 876 (1986). In *Piccinin*, we stated that due to the large number of unliquidated claims that if each claim was tried the process itself "would likely consume all the assets of the debtor." *Id.* We suggested that the bankruptcy court "arrive at a fair estimation of the value of all the claims." *Id.* To assist in the estimation process the district court appointed Professor Francis E. McGovern, who was familiar with such matters, as the court's expert to develop a data base regarding Dalkon Shield Claims. The Dalkon Shield Claimant's Committee, the Unsecured Creditor's Committee, the Future Claimant's Representative, the Equity Security Holder's Committee, Robins and Aetna all had experts to assist Professor McGovern. The data base included the results of a two page "Dalkon Shield Questionnaire and Claim Form" from more than 195,000 claimants. It also contained roughly 6,000 responses to a fifty page, "McGovern Survey Questionnaire" and medical records from a random sample of 7,500 claimants. The data collection process lasted more than a year and a half. Each of the experts hired by the various parties used the basic data in various ways to arrive at an estimation.

The district court conducted an estimation hearing from November 5, 1987 to November 11, 1987. At the hearing the parties' various experts testified. The district court considered that the testimony of the various experts estimated the claims as follows: Robins'—.8 to 1.3 billion, Equity Security

Holders'—1.03 billion, Unsecured Creditors'—1.54 billion, Aetna's'—2.2 to 2.5 billion, and the Dalkon Shield Claimants'—4.2 to 7 billion. The district court decided that the proper estimate was 2.475 billion.[4]

At this point it is well to relate somewhat more fully the procedure used in arriving at the estimate found by the district court. As the district court noted, the testimony as to the estimated recovery value of the Dalkon Shield claims ranged from 600 [sic] million to 7 billion dollars. The testimony with respect to the 7 billion dollar figure, however, was not credited by the court.

Professor McGovern was assisted by the experts mentioned representing each of the interests involved in this case, and the procedural steps which were taken were all done by consensus among the experts representing all of the interests, so that the conclusions which the various experts drew from the evidence or the findings of the court from the evidence were the only things left open to exception.

As has been previously mentioned from time to time in the reports of these cases, the district court entered a bar date on claims and prescribed a very informal method of advising the court that a claim was being filed. The bar date of course limited the potential claimants. From these potential claimants, there were eliminated, by standard statistical and analytical methods, about one-third of the initial claims which had been filed. A detailed analysis of those claims not eliminated was performed by sending the detailed questionnaire previously mentioned to a randomly selected sample of several thousand

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[4]We note that the district court's figure was within the range of the second highest estimation—that of Dr. Francine F. Rabinovitz, the expert for Aetna. The district court repeatedly rejected the credibility of the expert for the Dalkon Shield Claimants, the only expert with a higher estimation than Dr. Rabinovitz.

of the claims remaining. The questionnaire asked for information, which, in the most general sense, was received back, concerning the insertion of the Dalkon Shield in the claimant and the nature of the claimant's injuries, including verification by way of medical records where possible.

A detailed analysis of all of the responses was then performed by the expert witnesses who testified in the case. A good example of competent testimony was that of Dr. Francine F. Rabinovitz, who testified on behalf of Aetna. We illustrate with her testimony because her conclusions more nearly match the conclusions of the district court than any other single witness offered. She took the returned questionnaires as a representative sample and weeded out those, for example, with no medical proof of use of the Dalkon Shield. As a further example, she classified the claims into those with and without complications and the nature of the injuries claimed. She took a further random sample of the claims as she had divided them up and got three Aetna claims adjusters who had been experienced in the actual adjustment of Dalkon Shield claims and instructed those adjusters to set a value on a sample of the claims she referred to them, considering that there was liability, so the only thing the adjusters had to consider in setting a value on a claim was the nature of the injury and of course the proof required and the attendant expenses. The adjusters were instructed not to place a low estimate on the claims. Dr. Rabinovitz, by using this method, drew the conclusion that the compensation necessary, assuming that documentation that use of the Dalkon Shield were a prerequisite, would be in excess of 1.9 billion dollars, and, assuming that documentation would not be a prerequisite, a sum in excess of 2.4 billion dollars. To these sums, she would have added modest payments to all active claimants, whatever the merit of such claims, and 50 million dollars as a reserve against future injuries, which made her figures for documented injuries at slight-

ly more than 2.0 billion dollars and for undocumented injuries slightly more than 2.5 billion dollars. Dr. Rabinovitz further concluded that she thought there might be a considerable reduction from disallowance of claims and that she would reasonably anticipate the total indemnity of the obligation to be 2.2 to 2.3 billion dollars. That some reduction is not unreasonable is illustrated by a remark we have come across in the record that one claimant apparently said she took two Dalkon Shields a day.

From our brief recital of a small part of the evidence before the district court, we see that its finding of 2.475 billion dollars as the estimate to include all Dalkon Shield claims is not clearly erroneous under Rule 8013. Indeed, we think the district court would have been quite justified in accepting Dr. Rabinovitz' testimony, so appellants may not complain about the district court's arrival at a somewhat higher figure.

Finally, the appellants challenge as without the power of the bankruptcy court the portion of the Plan which requires the injunction of suits that have connection to the Dalkon Shield, against certain entities other than Robins. Robins argues that the injunction is a proper exercise of the district court's power to channel claims to a specific *res* or alternately that the injunction is proper because 94.38% of the claimants voted for the Plan and thereby consented to the injunction. We affirm, but our reasoning differs somewhat from that of Robins, although its position, of course, should enter into consideration. The suits in question which some of the appellants wish to bring are against Robins' directors, Robins' and Aetna's attorneys, and Aetna, seeking to hold them as joint tortfeasors with Robins for Dalkon Shield injuries.

We begin our discussion by considering the impact of our decision in *In Re: A. H. Robins Company Inc.*, 88-1755(L) (*Breland* settlement), decided this date, on this challenge to

the Plan's injunction. In *Breland*, we affirmed the district court's certification of a mandatory non-opt-out class for members of class A and a class which allows an opt-out for compensatory damages for members of class B. Class A is defined as those Dalkon Shield claimants who met the filing deadlines of the district court and therefore have a non-subordinated claim against the trust fund set up for the claimants in the Robins' reorganization. Class B is defined as those Dalkon Shield claimants who did not meet the filing deadline or like procedural requirements and are therefore not eligible for a nonsubordinated recovery from the trust fund for reasons not related to the abstract merits of the claims. The *Breland* settlement, however, provided all class B claimants with a second chance to pursue their Dalkon Shield claims by staying in the class and applying to the Claims Resolution Facility.[5] For class B members the merits of their Dalkon Shield claims would be determined in the same method as is in place to determine class A members' claims except they would have no right to a jury trial. Their claims would be paid by the two Outlier policies issued by Aetna which provide for $100,000,000 to pay such claims.[6] No party challenges the adequacy of the Outlier policies to pay the class B claims. We

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[5]All claimants, both class A and B, are seeking to recover for injuries caused by use of the Dalkon Shield. The class B claimants were barred from non-subordinated recovery from the trust fund set up by the debtor generally because they failed to file in time . They turned to alternative defendants, which they allege are joint-tortfeasors, for recovery for their Dalkon Shield claims.

[6]In addition to the $100,000,000 total of the Outlier policies, if there is excess coverage under the $250,000,000 Primary Excess Policy, it becomes an excess layer policy to the Outlier Policies. This, as well as the participation of class B claimants in any excess of the trust fund, provides possible additional layers of protection to the class B claimants. Since there is no challenge we do not address the legal or factual strength of their claims. The district court, in its order approving the *Breland* settlement, found the claims against Aetna to be weak both factually and legally.

therefore are entitled to and do assume that the claims of all class B claimants who wish to have the merits and amount of their claims ascertained by the Claims Resolution Facility will be fully satisfied. However, the *Breland* settlement, in conjunction with the Plan, did not force the class B claimants who chose to opt-out to stay within the settlement. They could elect to forgo the benefits of the settlement and retain their right to sue Aetna and to sue medical providers for malpractice.[7] In *Breland*, we also approved the class action settlement, which expressly bars the members of class A and the members of class B who did not opt-out from further prosecuting their Dalkon Shield claims other than pursuant to the terms of the settlement. Given this bar from pursuing compensation for their Dalkon Shield injuries, other than pursuant to the order, the injunction complained of has no real effect on the rights of members of class A and the members of class B who have not exercised their right to opt-out.

The Plan's injunction, therefore, only has real impact upon members of Class B who have elected to opt-out of the Breland settlement. The injunction under sections 1.85 and 8.04 of the Plan prevents these claimants from suing all third parties other than "insurer[s]" (which includes Aetna) and claims based exclusively on medical malpractice. The class B members who have elected to opt-out, it is remembered, claim to have causes of action as joint tortfeasors with Robins against Robins' directors, Aetna, and law firms who represented both Robins and Aetna. A suit against any of the parties mentioned by the class B opt-out members would affect the bankruptcy reorganization in one way or another such as by way of indemnity or contribution. See *A. H. Robins Co. Inc. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986), cert denied, 479 U.S.

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[7]There are approximately 111,000 class B claims, and only 2,960 exercised their right to opt-out.

876 (1986). And, in all events, provision for payment in full of all class B claimants has been made.

Bankruptcy courts are courts of equity. See *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984). 11 U.S.C. § 105(a) gives a bankruptcy court the power to issue "any order, process or judgment that is necessary or appropriate to carry out the provisions of this title," and confers equitable powers upon the bankruptcy courts. *In Matter of Old Orchard Inv. Co.*, 31 B.R. 599 (W.D. Mich, 1983). Given the impact of the proposed suits on the bankruptcy reorganization and the fact that the class B members who chose to opt-out could have had their claims fully satisfied by staying within the settlement, the bankruptcy court's equitable powers support the questioned injunction. We think the ancient but very much alive doctrine of marshalling of assets is analogous here. A creditor has no right to choose which of two funds will pay his claim. The bankruptcy court has the power to order a creditor who has two funds to satisfy his debt to resort to the fund that will not defeat other creditors. *Columbia Bank for Cooperatives v. Lee*, 368 F.2d 934, 939 (4th Cir. 1966), cert denied, 386 U.S. 992 (1967); *IV Minor's Institutes* 1248 (1883). Here, the carefully-designed reorganization of Robins, in conjunction with the settlement in *Breland*, provided for satisfaction of the class B claimants. However, some chose to opt-out of the settlement in order to pursue recovery for their injuries from Aetna or from medical providers for malpractice. It is essential to the reorganization that these opt-out plaintiffs either resort to the source of funds provided for them in the Plan and *Breland* settlement or not be permitted to interfere with the reorganization and thus with all the other creditors. Since they have chosen opt-out rather than payment in full, they may have no complaint about a restriction placed on their ability to sue others. Permitting a suit by them in violation of the Plan is a defeat of the Plan and a resulting defeat of the other creditors.

"Particularly since the insurance settlement/injunction arrangement was essential in this case to a workable reorganization, it falls within the bankruptcy court's equitable powers 'which traditionally have been invoked to the end that. . . substance will not give way to form, that technical considerations will not prevent substantial justice.'" *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 94 (2nd Cir. 1988), cert denied, 57 U.S.L.W. 3235, quoting *In re U.N.R. Industries. Inc.*, 725 F.2d 1111, 1119 (7th Cir. 1984).

The appellants finally contend that 11 U.S.C. § 524(e) prohibits the injunction. Section 524(e) states that "[e]xcept as provided in subsection (a)(3) of this section,[8] discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." Some courts have held that § 524(e) and its predecessor, § 16 of the 1898 Bankruptcy Act, results in the bankruptcy court having no power to discharge liabilities of a nondebtor pursuant to the consent of creditors as a part of a reorganization plan. See *Underhill v. Royal*, 769 F.2d 1426, 1432 (9th Cir. 1985); *Union Carbide Corp. v. Newboles*, 686 F.2d 593 (7th Cir. 1982). However, the Fifth Circuit has stated that "[a]lthough section 524 has generally been interpreted to preclude release of guarantors by a bankruptcy court, the statute does not by its specific words preclude the discharge of a guaranty when it has been accepted and confirmed as an integral part of reorganization." *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987).[9]

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[8]Subsection (a)(3) deals with community property of spouses and is not applicable.

[9]The court did not decide the issue but assumed without deciding there was a jurisdictional question under § 524 as to the authority of the bankruptcy court to release non-debtors. *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1051 at n.5. (5th Cir. 1987).

We find the language used by the Fifth Circuit persuasive. Whatever the result might be as to the application of § 524(e) in other cases, we do not think that section must be literally applied in every case as a prohibition on the power of the bankruptcy courts, as appellants would have us apply it here. In this situation where the Plan was overwhelmingly approved, where the Plan in conjunction with insurance policies provided as a part of a plan of reorganization gives a second chance for even late claimants to recover where, nevertheless, some have chosen not to take part in the settlement in order to retain rights to sue certain other parties, and where the entire reorganization hinges on the debtor being free from indirect claims such as suits against parties who would have indemnity or contribution claims against the debtor, we do not construe 524(e) so that it limits the equitable power of the bankruptcy court to enjoin the questioned suits. We leave questions concerning cases in which § 524(e) does apply for another day.

The orders of the district court appealed from are accordingly

AFFIRMED.

*ADDENDUM

APPEAL NUMBER	APPELLANT	DALKON SHIELD NUMBER
88-1750	Rosemary Menard-Sanford	82114
	Karen Velenzuela	82207
	Constance Miller Engelsberg	82142
	Nancy Lauri Adams	82174
	Carolyn Harris	303631
88-1754	Mary Albert	252684
	Carol Angus	215751
	Judith Beaule	62242
	Janis Belcher	237565
	Daniel Belcher	237566
	Karen Belcher	237564
	David Belcher	243035
	Melanie Bennett	183837
	Nancy Benson	191191
	Jean Boeckler	122207
	John Boeckler	122208
	Janet Bruce	296254
	Melody Cannon	228522
	Barbara L. Carr	20475
	David W. Carr	244903
	Helen Carty	78400
	Sandra Cassier	7647
	Patrick Cassier	7646
	Victoria Charnock	228521
	Ellen Chodes	42705
	Elizabeth Cote	26935
	Brenda Davis	111886
	Marion DuFord	78493
	Deborah Fallon	80309
	John Fallon	80310
	Dawn Gebo	7306
	Janet Gregory	79226
	Frank Gregory	79225
	Sarah E. Haskell	78399

APPEAL NUMBER	APPELLANT	DALKON SHIELD NUMBER
88-1754 (continued)	Pamela Hockenbull	78909
	Patricia Johnson	78581
	Mary E. Jordan	291790
	April Weeks-Korn	78397
	Leonard Korn	78398
	Debora Lamont	96144
	Beverly McClure	80313
	Katherine Maher	19424
	Elaine Nizza	228523
	Donna Oberg	77966
	Diane Pinard	7113
	Jeanne Robey	237567
	Paul Robey	237568
	Pamela Saxby	78580
	Shellie Shapiro	78583
	Howard Shapiro	78582
	Sharon Lee Spern	187651
	Rebecca Steinbach	281041
	Jeannette Sweet	85890
	Beverly Tonkin	184469
	Donna Tshanakas	222583
	Nicholas Tshanakas	222584
	Daphne Whitmore	78910
	Linda Bisson	172492
	Anne Soucy	286513
	Sally Adams	225908
	Randy Adams	225886
	Charlotte Allen	227324
	Charles Allen	225896
	Jan Allen	225897
	Barbara Bill Klinger	225899
	Linda Brust	225323
	Virginia Bryan Roberts	225901
	Gwendolyn E. Buettner	70274
	Carolyn Campbell	225900
	Lynn Crosby	225902
	William Franklin Crosby	233041
	Mary Kathryn Deemer	235677
	John Deemer	225885

APPEAL NUMBER	APPELLANT	DALKON SHIELD NUMBER
88-1754 (continued)	Donna Faremouth	260787
	Charles Faremouth	260788
	Cindy Franco	225884
	Fred Franco	231644
	Elena Friedman	225893
	Darleene L. Frink	226609
	Kenneth Frink	225964
	Diane Goshorn	113174
	Christiane J. Guignard	219368
	Linda Harre	225883
	William Harre	225894
	June Ellen Harris	225895
	Carol Harterink	225903
	Anton Harterink	225904
	Rosanne Heard	225905
	Jimmie Dale Heard	225906
	Atha Henderson	225907
	Jill Campion Huff	233339
	Pamela Johnson	7353
	Ted Johnson	7356
	Wanda Lancaster	6020
	Deborah Jean Lenzi	225485
	Betty Leobold	225486
	William D. Leobold	235694
	Susan Lippner	225890
	Robert Lippner	2258
	Victoria L. McCord	225888
	Cheryl McFarland	192508
	Dayna McKendree	225887
	Diane Mance Zywotko	225892
	Carol Mitchell	225891
	Susan Nehrig Cole	46096
	Paul Nehrig	46097
	Deloris A. Nicolaou	255933
	Sherry Peavy	225322
	Kennetb Peavy	225488
	Flora Poe	109594
	Brenda Reilly	225489
	Gerald Reilly	225490

APPEAL NUMBER	APPELLANT	DALKON SHIELD NUMBER
	Patricia Scolaro	225491
	Edward Scolaro	235693
	Wanda Joe Selvanik	225492
	Michael Selvanik	225487
	Janice Denise Simmons	7355
	Merrick Simmons	7354
	Martha E. Sims	225483
	Eslyn South	189220
	Tracy Staneart	176376
	Debra Renee Thompson	225321
	Denise B. Wax	225946
	Dan Wax	234731
	Rachael O. Thompson	200369
	Edwin L. Wilbur	202442
	Sharon Malloy Wilber	201016
	Harold E. Kerkhoff, Jr.	200370
	Robert F. Grant, Deceased	200373
	Robert W. Adams	200368
	Gillian L. Adams	200367
	Mr. R. S. Shaw	285422
	Blanche M. Shaw	202439
	Donna M. Kerkhoff	200375
	Kathleen A. Denise	62658
	Jim H. James	200366
	Beatrice D. Sewell	200374
	Kenneth R. Livingston	200883
	Gloria W. Livingston	200372
	Harvey H. Friedman	200371
	Arlene Whitaker James	200365
	Phyllis B. Puckett	225059
	Rhalda S. Friedman	202440
	Joyce F. Grant	202441
	Barbara A. Purvis	202438
88-1756	*Albert Sivley	156549
88-1758	*Louise Anderson	40014
	*Jan Beck	40021
	*Mary Jo Bennett	97533

*Not a petitioner

APPEAL NUMBER	APPELLANT	DALKON SHIELD NUMBER
	*Sandra Bescheinen	314579
	*Patricia Bonn	40029
	*Diane Brosco	40038
	*Karla Clark	866239
	*Catherine Crawford	40065
	*Silvia Crockett	40066
	*Dee Dahl	269915
	*Katheryn Duryea	192464
	*Mickie Engel	179358
	*Mary Fischer	40095
	*Arlene Ford (Robinson)	100767
	*Sandra Fritz	33463
	*Susan Geisler	236132
	*Nancy Gossan	275731
	*Constance Halverson	64890
	*Lois Hansel	15085
	*Rachel Jones	183223
	*Lisa Kerr	66317
	*Rosemary Lambert	174880
	*Nora Manning	40169
	*Carolie Martin	40172
	*Lee McDaniel	40183
	*Eleanor Meyer	236151
	*Rosemary Nelson	66584
	*Charlotte Pool	66605
	*Faye Schultz	14448
	*Sharon Scott	269922
	*Ginger Shirley	66666
	*Yvonne Spicer	67003
	*Lyndalou Steckler	66566
	*Shelly Stisser	66682
	*Carole Torres	66478
	*Suzanne Walfoort	304062
	*Mary Ann Watrous	
	*Diane Zapata	153920
88-1759	Lynn Scott Carol Lopez	

*Not a petitioner

APPEAL NUMBER	APPELLANT	DALKON SHIELD NUMBER
88-1760	Elaine Cumley	207022
	Jean Abad	268523
	Eileen Ackerman	82175
	Linda Adamecz	232928
	Donna Albright	268416
	Christine Alfaros	82173
	Cathy Allen	82172
	Paulette Allen	269145
	Scott Allen	268521
	Nancy Alotis	269161
	Diane Anderson	268414
	Susan Anderson	82171
	Douglas Anderson	268519
	Anne Angelou	82170
	Dimitris Angelou	268516
	Cynthia Apple	275727
	Ann Frances Aspon	82243
	Beverly Annette Back	203008
	Deborah Barbour Eaton	82235
	Beret Barnes	82169
	Dixie Barnes	203011
	Beverly Bartley-Mustin	82168
	Jane Beedle	82167
	Kathy Bennett	275752
	Edith (Deedi) Berde	275753
	Janice Berg	268481
	Hanna Berkow	87077
	Birohnie Blair Dowdell	202946
	Sandra Bliven Budd	82166
	Jennell Boote	82165
	Stessi Boyd	275736
	Jean Brewer	82164
	Geraldine Broeffle	82163
	Carolyn Brown	107919
	Marguerite Bryson	203023
	Sandra Bucsit	268413
	Veronica Burns-Peterson	82162
	Norma Cabrera Reid	82161
	Sylvia Cameron	82153

APPEAL NUMBER	APPELLANT	DALKON SHIELD NUMBER
88-1760 (continued)	Chris Campbell	203020
	Cynthia Campbell	269162
	Linda Carlsen	203010
	Jennifer Cheney	268475
	Judy Clark	82154
	Karen Clement	268518
	Karl Clement	268509
	Myra Cole	82155
	Kathy Collin	32966
	Arthur Collin	268503
	Patricia Conley	82156
	Bonnie Cook	203019
	Sheryl Cooper	202980
	Dawn Covell	82210
	Dianna Crabb	82143
	Karen Crenshaw George	82144
	Michael Crenshaw	268506
	Linda Groskey	82146
	Kenneth Croskey, Sr.	268501
	Judith Danforth	269148
	Adis Daniels	271762
	Monica Davis	233127
	Becky Deeter	202989
	Maureen DeGaetano	91499
	Diane DeRooy	82148
	Christina DeWeese	82236
	Mary Ann Dizon Lancaster	203018
	Catherine D. Tomlinson	202979
	Janet Dowling	82149
	Larry Dowty	
	Lorraine Dressel	203017
	Susan Duram	268471
	Susan Jane Durham	82139
	Leolynn DuVal	202982
	Christine Eager Leback	82140
	Cathi Eicher	203033
	Charlene Eitelberg	275737
	Monica Ellis	82141
	James Ellis	268498

APPEAL NUMBER	APPELLANT	DALKON SHIELD NUMBER
88-1760 (continued)	Danelia Fanello	82135
	Phyllis Fernandes	203039
	Edward Fernandes	268496
	Gloria Fields	120488
	Margaret Fithen	203012
	Cleo Fitzgerald	82132
	Gregory Fitzgerald	268494
	Marcia Fletcher	35024
	Julia Foss	268410
	Judith Fowe	82134
	Robert Fowe	268446
	Patricia Fox	268513
	Ronald Fox	268530
	Juanita Francis	82237
	Don Francis	268492
	Jackie Franck	229230
	Delilia Frank	82136
	Marie Gallegos	82137
	Pamela Garrett	268511
	Mary Jane Gassert	82138
	Rhonda Gateman Herman	268510
	Linda Gause	82121
	Kathryn Gillette	202985
	Catherine Gitchell	82123
	Louis Gitchell, Jr.	268491
	Christine Gitchell	200563
	Cathy Reiner Godwin	82122
	Cliff Godwin	268488
	Pamela Goldader	269147
	Judith Grafing	82124
	Richard Grafing	268487
	Alice Grimes	82125
	Mary Grubb	268463
	Tamara Guslander	82126
	Charles Guslander	268483
	Carol Hawkins	268461
	Ruby Haywood	82127
	Christen Hearn	82128
	Melvin Hearn	268482

APPEAL NUMBER	APPELLANT	DALKON SHIELD NUMBER
	Eloise Hebert	268508
	Christine Henshaw	82129
	Gail Hertzler Buehler	203022
	George Buehler	268515
	Pam Heselgrave	199804
	Karin Hoffman	276494
	Gayle Holm	202995
	Joanne Huffman	268507
	David Huffman	268480
	David Huffman	200543
	Lori Inglis	151878
	Rose Anne Jacobs	4556
	Rhonda Jared	82130
	Cathy Jensen	82238
	Pam Jensen	82204
	Christy Johnson	82198
	Deborah Johnson	69841
	Dale Johnson	214683
	Karren Johnson	82199
	Linn Johnson	268478
	Elaine Jones Donovan	82200
	Helen Jones	203043
	L. C. Jones	268476
	Patricia Jordshaugen	203042
	Lucinda Karlic	82201
	Stefan Karlic	268470
	Donna Kirby	82188
	Clyde Kirby 268468	
	Janice Knudsen	82208
	Ruth Korkowski	82186
	Shirlee Krumplemann	269164
	Maria Krzeszowski	203000
	Mieczyslaw Krzeszowski	275715
	Sandy Lasicka	82202
	Bonnie L. Wasserman	82203
	Janet LaWall	82195
	Winnie Sue Lee	82196
	Linda LeFebvre	202998
	Carmen Leuschner	268504

APPEAL NUMBER	APPELLANT	DALKON SHIELD NUMBER
88-1760 (continued)	Robert Leuschner	268466
	Molly Linderoth	82197
	Charlene Linvog	268505
	Dixie Llewellin	82190
	Dave Llewellin	268464
	Janna Gingras (fka London)	82191
	Linda Look	82192
	Sharron Loveall	228981
	Shannon Lowe	130082
	Kathy Lumsden	203041
	Nancy Lyon	82193
	Linda Magnuson	82118
	Carol Mahony	202994
	Cindy Mahugh	268457
	Barbara Maine	82119
	Margaret Mamon	82120
	Tony Mamon	268442
	Karen Manning	82108
	Debra Marcus	104289
	Kathy Mare	82110
	Margaret Maredza	82111
	Diane Strayer (fka Martin)	82112
	Jane Martin	82133
	Ricbard Martin	268441
	Shirley Martinez	268417
	Nina Mason	56672
	David Mason	268436
	Laine Jill McClellan	268412
	Sue McCracken	126795
	Veronica McCreary-Oliver	82113
	Kenneth Oliver	268462
	Constance McDowell	268502
	Petra (Peggy) McIntyre	203024
	Karen Meola	202999
	David Meuli	
	Jodi Miasnik	82116
	Stephanie Lieb Migdal	82117
	Gerald Migdal	268529
	Gwendolyn Miller Juleff	82184

APPEAL NUMBER	APPELLANT	DALKON SHIELD NUMBER
88-1760 (continued)	Rose Miller	178415
	Beverly Mills	82183
	Marla Mobley	82160
	Shelia Mohn	82182
	Valerie Moore	275747
	Maggie Morales	96003
	Gloria Morris	269154
	Lorena Mrachek	202986
	Kathleen Munro-McNeill	82181
	Richard Munro-McNeill	268528
	Debra Nelson	82180
	Victoria Nomikos Blair	82179
	Hazel Norbury	203163
	Jackie O'Ryan	82189
	Johnnie Clay Paradiso	203015
	Margaret Parent	116882
	Sarah Parrington	82178
	Rosalie Passarelli	82177
	Carmella Patterson	82176
	Samuel Patterson	268432
	Sue Peet	215683
	Christina Peterson	275765
	Christine Peterson	82239
	Walter Peterson	268430
	Shirley Peterson	145090
	Barbara Phair	269160
	Heidi Pierotti	82240
	Alberta Plate Franco	82242
	Pat Premel	268497
	Steve Premel	268429
	Susan Pupera	82231
	Deloris Ragazzo	202990
	Victoria Raider Romero	275760
	DiAnne Rainard	82233
	Marty Reeh	97855
	Deborah Rennick	268142
	Debra Porter Rettman	203027
	Peter Rettman	275758

APPEAL NUMBER	APPELLANT	DALKON SHIELD NUMBER
88-1760 (continued)	Eula Rials	82159
	Margaret Richards	88274
	June Richey	203028
	Lloyd Richey	275716
	Deja Robins	82234
	Valorie Robinson Jensen	82223
	Sandra Roose	19657
	Angela Rose	268493
	Crystal Rose	203003
	Sharon Rossmeier	82224
	Demetra Rouvas	82225
	Julie Ryan	82226
	Connie Samp	82158
	Donna Sanders	268490
	David Sanders	268426
	Susan Sasnett	82227
	Jay Sasnett	268424
	Deborah Brown Saxton	268448
	Lisa Schanz	82228
	Allahna Schriver	82229
	Sharon Seal	82157
	Dianne Seibold	82230
	Horst Seibold	268422
	Teresa Selfe	82217
	Eilene Sharp	82151
	Kathleen Shelby	82219
	Ruby Shumate	82220
	Donnell Shumate	268420
	Shirley Shumway	43185
	Michael Shumway	268525
	Sally Siddiqi	82221
	Donna Siler	82222
	Marilyn Skone	203014
	Wanda Slater	268489
	Jacqueline Smith	82216
	Donald Smith	268418
	Kathleen Smith	268486
	Robert Smitb	268474

APPEAL NUMBER	APPELLANT	DALKON SHIELD NUMBER
88-1760 (continued)	Judith Smith	82215
	Tim Smith	268415
	Deborah Snyders	82152
	Anke Spencer	268485
	Don Spencer	268437
	Colleen Still	227825
	Deborah Stoffel	82214
	Jackie Stone	141320
	Savana Swain	202997
	Clifford Swain	268435
	Renee Swanson	82194
	Carol Sycks	82213
	Robert Sycks	268434
	Kathy Syrdal	82212
	Phil Syrdal	268431
	Ann Tabasinske	89787
	Gary Tabasinske	7170
	Kay Tamura	82211
	Steven Tamura	268428
	Margaret Taplin	268445
	Deborah Tegelberg	202984
	Claudeen Tobiason	82205
	Jodi Tranter	203025
	Frank Tranter	268427
	Erma Turner	32831
	Kathryn Ulrich	268409
	Vicik Urias	82206
	Magic VanAusdal	268408
	Vicki Volkersz	82254
	Marilyn Waara	275726
	Elizabeth Walton Kilner	82253
	Teresa Ward	236256
	Kathleen Warren	82251
	Donald Warren	268524
	April Weber	82252
	Chriss Webster	21897
	Karolyn Webster	268443
	Gloria White	82250

APPEAL NUMBER	APPELLANT	DALKON SHIELD NUMBER
	Donald White	268425
	Lynda Williams	82187
	Linda Lee Wilson Cas law	82249
	Susan Wilson	203030
	Janet Lee Winston	203013
	Mary Winters	268484
	Hazel-Jean Wolbert	202996
	Dyanna Wolcott	82247
	William Wolcott	268423
	Ardyth Wuori	82248
	Penny Wykes	82246
	Sherry York	82245
	Gary York	268421
	Carolyn Young	31271
	Diane Young	275763
	Linda Young	82244
	Joyce Zaborowski	82241
	Sgt. Daniel Zaborowski	268419
	Greg Ross	268526
88-1763	Alexia Anderson	225182
	Barbara Anderson	231938
	Philip Anderson	268170
	Paula C. Bannow	11228
	John Bannow	271718
	Diana R. Beard	10440
	Robert Davis Beard	271192
	Sherry Bergman	15385
	Charles Bergman	271992
	Marsha Brown	71237
	Jeannette Bulinski	15584
	Gregg Gundersen	272541
	Wendy R. Busch	10864
	Lillian Castillo	122920
	Elizabeth Chamberlayne	48517
	Carol Cooke	10446
	Donna Cornelisse	15383
	Denise Crowell	10865
	Mike Crowell	271721

APPEAL NUMBER	APPELLANT	DALKON SHIELD NUMBER
88-1763 (continued)	Jacki Dasso	10454
	John Thompson	271720
	Sharon Ebert	223890
	Dennis Ebert	271532
	*Laura B. Emerson	16301
	Gary S. Emerson	263135
	Carol Evans	11339
	Dennis S. Evans	271538
	Melinda F. Evans	10448
	Hawley Roger Evans	272532
	Carla Magdanz Everett	15585
	Barbara Ferguson	10862
	Charles Ferguson	262197
	Nancy C. Franz	15382
	Roger A. Franz	258077
	Julia Bloch Frey	163423
	Janette S. Gamet McMahon	11344
	George McMahon	272764
	Mary C. Graham	15386
	Ronald Graham	274584
	Xenia Graves	11341
	Cheryl A. Gruse	11334
	Roberta Guildner	10501
	Ava Hamilton	11343
	Delmar Hamilton	262660
	Delores M. Haro	228508
	Lori Haugland	206197
	Mary R. Hein	16655
	William Hein	272766
	Janet Heitzmann	10449
	Mary Frances Hilko	243918
	Lucy Judson	10444
	Craig Alan Yeager	272765
	Betty Kenzel	10443
	Richard E. Kenzel	263118
	Judy Kurtz	10452
	Judith Lavezzi	6088
	Susanne Leutbauser	11337
	Truman Leuthauser	262311

*Not a petitioner

APPEAL NUMBER	APPELLANT	DALKON SHIELD NUMBER
	Harriet Elizabeth Mann	223977
	Sharon L. Mazotti	223979
	Daniel Mazotti	268168
	Sandra R. Merrill	10451
	Roy R. Merrill	262312
	Laurel Ruth Mifflin	255908
	John Mifflin	273601
	Nathan Mifflin	254594
	Sandra D. Miller	11342
	John K. Miller	268162
	Peggy Morgan	11336
	Barbara R. Now[illegible]	10445
	Mary Ann Perkins	10447
	Russell Perkins	263117
	Ravonda L. Potter	10450
	Roger Jay Potter	271533
	Kathy Quinton	16300
	Judith Anne Ramsay	10442
	Charles E. Ramsay	271723
	Pamela S. Reiter	11340
	Peter Reiter	274587
	Ella Ruth Rogers	9295
	Elaine Rogers	16298
	Donis Rogers	265558
	Christine Seiffert	171920
	Stefanie Selden	9271
	Judy Sheppard	25992
	M. Lee Sheppard	268166
	Jessica A. Simkulet	11335
	Janet Singletary	16654
	Roger Singletary	268167
	Evelyn M. Snyder	16302
	Andrew Snyder	15387
	Marcia Steel	16303
	Mary Stewart	15387
	Charles D. Stewart	265520
	Karon Tiger	234904
	Thelma L. Tilman	236252
	Durcille Trolinger	206281

APPEAL NUMBER	APPELLANT	DALKON SHIELD NUMBER
88-1763 (continued)	Jo Susan Verspohl	13063
	Ronald Verspohl	272554
	Carol J. Waltz	16299
	Ronald F. Waltz	268165
	Kathleen A. Watson	199542
	Larry Watson	291814
	Abby Weinstein	166871
	Barry Weinstein	258076
	Diane West	10408
	Martha Whitehead	199551
	Marlyin Wilson	25436
	Vicki Woodard	10441
	Tom George	171536
	Deirdre J. Zietz	15384
	Leonard E. Zietz	260920
	Rebecca L. Adair	239633
	Gary A. Adair	239634
	Sharon C. Angel	145182
	Gene R. Angel	304529
	Katharine K. Beattie	106539
	Fareda E. Belcher	239629
	Floyd Belcher	106540
	Linda M. Black	239635
	William R. Black	239636
	Mary A. Bonner	37245
	Robert I. Bonner	239637
	Johnsie C. Brown	117778
	Joseph T. Brown, Jr.	326617
	Vicki L. Brown	106541
	Randy L. Brown	106542
	Juanita L. Brown	106543
	Shirley Mae Burroughs	106550
	Robert Burroughs	106551
	Beverley Davisson	106544
	William A. Davisson	106545
	Jason W. Davisson	106546
	Debra G. Dean	12776

APPEAL NUMBER	APPELLANT	DALKON SHIELD NUMBER
88-1763 (continued)	Mary Ann Evertson	106547
	Robert W. Evertson	106548
	Sandra L. Flynn	106549
	Joyce Frieders	106569
	Charles D. Frieders	106570
	Patricia Graber	269036
	Patricia J. Heuseveldt	239639
	Ronald W. Heuseveldt	239640
	Heather Hull	106571
	Kenneth L. Hull	106572
	Patty E. Hutton	106553
	Leon D. Hutton	106554
	Amy Marie Hutton	106552
	Charlotte S. James	269035
	Kay M. Kincade	243662
	Paul W. Kincade	243663
	Bonlyn G. Qulick	251829
	Anna Louise Luhman	106555
	Kersten Males	106575
	William Males	106576
	Roberta C. Martin	106573
	Keith A. Martin	106574
	Sarah E. McLeod Kirk	106556
	David C. McInnis	106557
	Billie Rae Mercer	106558
	Sandra J. Mertens	106559
	Ronald G. Mertens	106560
	Kay Diane Milligan	6205
	William D. Milligan	6206
	Betsy A. Munson	106577
	Judith A. Nichols	106561
	James R. Nicbols	106562
	Kathleen K. Pope	106578
	Rita M. Raaf	106579
	Richard D. Raaf	106580
	Courtney L. Raaf	106581
	Elizabeth W. Rinehart	239641
	Richard R. Rinehart	239642
	Gaylene P. Schommer	106563

APPEAL NUMBER APPELLANT	DALKON SHIELD NUMBER
John W. Schommer	106564
Rachel H. Scott	106565
David L. Scott	106566
Janet L. Scott	106582
Janice A. Sell	239643
Steven K. Sell	239644
Fay Annetta Smith	106583
Rhonda J. Smith	212510
Peggy A. Sneegas	239645
Roger A. Sneegas	239646
Rebecca J. Stafford	297307
Sonja G. Sweek	106584
Nancy J. Taylor	106567
Mary Ann Thomas	106585
Steven J. Thomas	106586
Elizabeth E. Tomaszewicz	239648
George R. Tomaszewicz	239649
Patricia Ann Tronsgard	106568
Catherine L. Wood	239630
Joda D. Wrigbt	239631

Appellants in Appeal No . 88-3602 are identical to those in NO. 88-1763 and their names are, therefore, not repeated.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

In re A. H. ROBINS COMPANY, INCORPORATED, Debtor.	)	Chapter 11 Case No. 85-01307-R Judge Merhige (Retained Proceeding)

ORDER CONFIRMING DEBTOR'S SIXTH AMENDED AND RESTATED PLAN OF REORGANIZATION*

The Debtor's Sixth Amended and Restated Plan of Reorganization (the "Plan") having been filed with this Court on March 28, 1988, by A. H. Robins Company, Incorporated, debtor and debtor-in-possession ("Robins" or the "Debtor"); and copies of the Debtor's March 28, 1988 Sixth Amended and Restated Disclosure Statement Pursuant To Section 1125 of the Bankruptcy Code (the "Disclosure Statement") (including the plan as an exhibit thereto) having been transmitted to all Dalkon Shield claimants, creditors and equity security holders as provided in the Court's April 1, 1988 (nunc pro tunc) "Order Approving Sixth Amended and Restated Disclosure Statement Pursuant To Section 1125 of the Bankruptcy Code and Giving Notice of the Confirmation Hearing on Robins' Plan of Reorganization" and the Court's April 18, 1988 "Order Under Bankruptcy Rule 3018 Authorizing Class Representatives To Accept Or Reject plan On Behalf Of Class Action Plaintiffs" (the "Ross Order"); and Robins having filed, and, served an "Objection and Notice of Hearing on Objection of A. H. Robins Company, Incorporated, Debtor and Debtor in-Possession, Under 11 U.S.C. 502(a) and Bankruptcy Rules 3003(c)(2) and 3007 to Certain Untimely Dalkon Shield Claims"

(the "Late Claim Objection"), seeking an order disallowing certain untimely filed Class 3A Dalkon Shield Claims and providing that holders of such Claims are barred from voting such Claims on the Plan; and Robins having filed and served an "Objection and Notice of Hearing on Objection of A. H. Robins Company, Incorporated, Debtor and Debtor-in-Possession, Under 11 U.S.C. § 502(a) and Bankruptcy Rule 3007 To Dalkon Shield Claims" (the "Punitive Damage and General Objection"), seeking an order providing that any portion of any Dalkon Shield Claim that is or may be for punitive or similar damages is disallowed and that no Dalkon Shield Claim is allowed except and to the extent provided for in the Plan and the Voting Order; and copies of the "Notice of the Date On Or Before Which Each Person Retained Or That May Request Compensation And/Or Reimbursement Of Expenses In This Case Pursuant To Section 327, 328, 330, 503(b) or 1103 Of The Bankruptcy Code Must File A Binding Estimate Of The Maximum Amount Of Allowance Of Compensation And Reimbursement Of Expenses To Be Requested In This Case" (the "Fee Cap Notice") having been transmitted to various persons retained, or that might seek compensation or reimbursement of expenses from the Debtor's estate pursuant to Section 327, 328, 330, 503(b) or 1103 of the Code (the "Noticed Professionals") pursuant to the Court's June 13, 1988 "Order Establishing and Approving Form and Method of Notice Of The Date On Or Before Which Each Person Retained Or That May Request Compensation And/Or Reimbursement Of Expenses In This Case Pursuant To Section 327, 328, 330, 503(b) or 1103 Of The Bankruptcy Code Must File A Binding Estimate Of The Maximum Amount Of Allowance Of Compensation And Reimbursement Of Expenses To Be Requested In This Case" (the "Fee Cap Order"); and Robins having proposed modifications to the Claimants Trust, the Claims Resolution Facility and Sections 4.03, 5.01 and 6.07 of the

Plan so as to permit (a) the creation of the Claimants Trust before the Consummation Date so that the $100 million "start-up" payment contemplated by Section 6.07 of the Plan can be made and administered and (b) other technical corrections; and a hearing on confirmation of the Plan, the Late Claim Objection, the Punitive Damage and General Objection, and objections to confirmation of the Plan having been commenced on July 18, 1988, after due and appropriate notice; and upon all of the evidence adduced at, memoranda filed in connection with, and arguments of counsel made at the Confirmation Hearing and at the hearing commenced on November 5, 1987, to consider Robins' June 5, 1987 motion for an order, *inter alia*, directing group estimation of Dalkon Shield Claims for purposes of plan voting, allowance and distribution; and upon the record compiled in this Case; and after due deliberation; and upon the decision and findings of this Court issued on July 25, 1988; the Court hereby finds and determines that:

1. The Plan has been accepted in writing by the creditors and equity security holders whose acceptance is required by law in accordance with the special voting procedures approved by this Court's Ross Order and Voting Order.

2. The provisions of Chapter 11 of the Code have been complied with.

3. The Plan has been proposed in good faith and not by any means forbidden by law.

4. Any payment made or to be made by the Debtor, or by a person issuing securities or acquiring property under the Plan, for services or for costs and expenses in or in connection with the Case, or in connection with the Plan and incident to the Case, have been approved by, or are subject to the approval of, the Court as reasonable.

5. The identity, qualifications, and affiliations of the persons who are to be directors or officers, or voting trustees, if any, of Robins or of the Successor Corporation after confirmation of the Plan, to the extent known, have been fully disclosed, and the appointment of such persons to such offices, or their continuance therein, is consistent with the interests of Robins' creditors and equity security holders and with public policy.

6. The identity of any insider that will be employed or retained by the Debtor or the Successor Corporation and his compensation have been fully disclosed, to the extent known.

7. No governmental regulatory commission has jurisdiction over rates charged by Robins.

8. Each holder of a claim or interest has accepted the Plan or will receive or retain under the Plan property of a value, as of the effective date, that is not less than the amount that such holder would receive or retain if Robins were liquidated under Chapter 7 of the Code on such date. Section 1111(b)(2) of the Code does not apply to the Claims of any Class, and no election pursuant to that section has been made in this Case.

9. Confirmation of the Plan is not likely to be followed by the liquidation or the need for further financial reorganization of Robins or the Successor Corporation.

10. Any Person now or hereafter asserting any right to payment against Robins based upon or in any manner arising from any Dalkon Shield, including, without limitation, any Dalkon Shield Claim, held a dischargeable Claim against Robins at the commencement of the Case if the Dalkon Shield to which such asserted Claim relates was inserted before the commencement of the Case.

11. The payments into the Trusts provided for under Sec-

tions 5.01(b), 5.02(b) and 6.07 of the Plan are sufficient to pay all Allowed Dalkon Shield Personal Injury Claims, Allowed Dalkon Shield Liquidated Claims and costs and expenses of the Trusts in full.

12. The Plan and the transactions contemplated by it do not provide for and, when consummated, will not constitute the liquidation of all or substantially all of the property of the Debtor's estate.

13. The transfers of property by Robins to the Successor Corporation (i) are or will be legal, valid and effective transfers of property; (ii) vest or will vest the Successor Corporation with good title to such property free and clear of all liens, charges, claims, encumbrances, or interests, except as expressly provided in the Plan; (iii) do not and will not constitute fraudulent transfers or conveyances under the Code or under the laws of the United States, any State, territory, possession or the District of Columbia; and (iv) do not and will not subject the Successor Corporation or its Affiliates to any liability by reason of such transfer under the laws of the United States, any State, territory or possession thereof or the District of Columbia based, in whole or in part, directly or indirectly, on any theory of law, including, without limitation, any theory of successor or transferee liability.

14. The releases and injunction provided in Sections 8.03 and 8.04 of the plan are an integral part of the compromises and settlements incorporated in the Plan.

15. The Robins Family Contribution is valuable consideration for the releases contained in Section 8.04 of the Plan, the injunction provided in Section 8.04 of the Plan, other terms and conditions of the Plan, and the benefits of the Other Claimants Trust.

16. The modifications to the Plan and related documents described in Exhibit B hereto are technical changes required to correct typographical errors or so that the $100 million start-up payment and distributions contemplated by Section 6.07 of the Plan and described in the Disclosure Statement can be made and implemented. As such, those modifications do not require resolicitation of acceptances or rejections, nor do they require that holders of Claims or interests be afforded an opportunity to change previously cast acceptances or rejections of the Plan.

17. On June 13, 1988, this Court entered the Fee Cap Order capping the aggregate amount of Fee Claims of Noticed Professionals at the amounts set forth in the binding estimates filed by them on or before July 13, 1988, in accordance with the Fee Cap Order.

18. The aggregate liability of Robins to Rorer Group Inc., Rorer Merger Corp., their affiliates or agents, arising under or related to the Agreement and Plan of Merger among Rorer Group Inc., Rorer Merger Corp. and Robins (including, without limitation, any liability for a termination fee or any breach of such agreement), does not exceed a termination fee of $25 million, plus those out-of-pocket expenses of Rorer Group Inc. specified in Section 9.2(d) of such agreement as may be approved by the Court.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED, THAT:

19. The Plan, a copy of which is attached hereto as Exhibit A, as modified by this Order and the modifications set forth in Exhibit B hereto, is hereby confirmed, and all acceptances and rejections previously cast for or against the Plan are hereby deemed to constitute acceptances or rejections of the Plan as modified by this Order and Exhibit B.

20. Paragraphs 4.03 and 5.01 of the Plan, the Claimants Trust, and Section B of the Claims Resolution Facility shall be and hereby are deemed to be modified as set forth in Exhibit B hereto.

21. Each of the objections to the Plan and all reservations of rights included therein are overruled.

22. The Initial Trustees of the Other Claimants Trust shall be Georgine M. Vairo, John M. Dowd, and Edward G. Modell.

23. Robins is hereby authorized, empowered, and ordered to execute and receive, the Claimants Trust Agreement and the Other Claimants Trust Agreement, thereby establishing the Claimants Trust and the Other Claimants Trust for the principal purpose of resolving and satisfying Dalkon Shield Claims and Dalkon Shield Liquidated Claims.

24. Robins is hereby authorized, empowered and ordered to make or cause to be made transfers to the Trusts pursuant to Sections 5.01, 5.02, and 6.07 of the Plan, and the Trusts, upon their establishment, are hereby authorized, empowered and ordered to receive all property which is or is to be transferred to them by Robins, Aetna or others in accordance with Sections 5.01, 5.02, 6.06, 6.07 and 6.08 of the Plan.

25. Robins is hereby authorized, empowered and ordered to issue, execute, deliver, file, and record any documents or court papers or pleadings, and to take any and all actions, that are necessary or desirable to implement, effectuate and consummate the transactions contemplated by the Plan, the Claimants Trust, the Other Claimants Trust, the Merger Agreement and the Claims Resolution Facility, or any of them, whether or not specifically referred to in the Plan (or related documents) and without further application to or order of this Court.

26. Consistent with the Plan (and in particular Article VI thereof, entitled "Means for Implementation of Plan"), the following agreements and documents which are attached as exhibits to the Plan, including all annexes thereto and all terms and provisions thereof, are hereby approved:

(a) The Claimants Trust Agreement;

(b) The Other Claimants Trust Agreement; and

(c) The Claims Resolution Facility.

27. The Claimants Trust is hereby authorized and ordered to implement the provisions of the Claims Resolution Facility, including without limitation the mailing of instructions, forms, and notices and the disallowance of claims as specified in Section B of the Claims Resolution Facility.

28. The Dalkon Shield Claim of any Personal Injury Claimant who failed to file with the Court a timely and proper written notice of Claim is a Disallowed Claim unless it is reinstated in accordance with the Claims Resolution Facility.

29. Effective on the Confirmation Date, Robins is discharged from any Claim and any "debt" (as that term is defined in Section 101(11) of the Code), and, as a result of entry of this Order, Section 1141(d) of the Code, and Section 8.01 of the Plan, Robins' liability in respect thereof is extinguished completely, whether reduced to judgment or not, liquidated or unliquidated, contingent or noncontingent, asserted or unasserted, fixed or not, matured or unmatured, disputed or undisputed, legal or equitable, known or unknown, that arose from any agreement of Robins entered into or obligation of Robins incurred before the Confirmation Date, or from any conduct of Robins prior to the Confirmation Date, or that otherwise arose before the Confirmation Date, including, without limitation, all interest, if any, on any such debts, whether such

interest accrued before or after the date of commencement of the Case, and including, without limitation, all debts based upon or arising out of Dalkon Shield Personal Injury Claims, Dalkon Shield Other Claims or Dalkon Shield Liquidated Claims, and from any liability of a kind specified in Sections 502(g), 502(h) and 502(i) of the Code, whether or not a proof of claim is filed or deemed filed under Section 501 of the Code, such Claim is allowed under Section 502 of the Code, or the holder of such Claim has accepted the Plan.

30. Robins' liability for all such Claims and debts described above, and for the costs and expenses of the Trusts, is limited to the amounts that it is paying or causing to he paid pursuant to the Plan. Robins' liability for all Dalkon Shield Claims and Dalkon Shield Liquidated Claims shall be limited and channelled to the Trusts, which shall be the sole source of payment of such Claims.

31. Any portion of any Dalkon Shield Claim that is or may be a Claim for punitive or similar damages is a Disallowed Claim; provided, however, that holders of Dalkon Shield Claims subject to the Claims Resolution Facility are entitled to receive from the Claimants Trust any sums payable in lieu of punitive damages pursuant to the Claims Resolution Facility.

32. No Dalkon Shield Claim shall be allowed except and to the extent provided for in the Plan and the Voting Order, and Robins' objection to Dalkon Shield Claims set forth in paragraph 7 of the Punitive Damage and General Objection shall be resolved by and under the Claims Resolution Facility.

33. The releases referred to and described in Section 8.03 of the Plan are effective as provided in Article VIII of the Plan, and Robins is hereby authorized and empowered to execute and deliver all documents necessary to effectuate such releases. Upon the entry of this Order, and except as other-

wise expressly provided in the Plan, (a) all Persons (i) who have held, hold or may hold Claims, including, without limitation, Dalkon Shield Claims or Dalkon Shield Liquidated Claims or (ii) who have held, hold or may hold Robins Common Stock, and (b) the Debtor, the Successor Corporation and their Affiliates, in consideration for the promises and obligations of the Debtor and the Successor Corporation under the Plan, including the establishment and funding of the Trusts, are hereby deemed to have forever waived, released and discharged all rights or claims, whether based upon tort, fraud, contract or otherwise, which they heretofore, now or hereafter possess or may possess against any Person (excluding only Unreleased Claims) based upon or in any manner arising from or related to (w) the Dalkon Shield, (x) the research and development, manufacture, distribution, sale, provision, recommendation, insertion, use or removal of a Dalkon Shield, (y) the processing, adjustment, settlement, payment, defense, negotiation or handling of any claims, demands, suits, causes of action or proceedings, based upon or relating in any way to the Dalkon Shield, or (z) the failure to warn, disclose or provide information concerning, or to take remedial action with respect to, the Dalkon Shield, including, without limitation, (a) those for indemnity, whether contractual or otherwise, contribution, subrogation and reimbursement with respect to any claim, demand, proceeding, suit or cause of action that has been, is, or may be asserted against any person based upon or in any manner arising from or relating to any of the matters enumerated or described in (w), (x), (y) and/or (z) above, (b) those for death or personal injuries, including emotional distress, (c) those for damages, including punitive damages, (d) those for attorneys' fees and other expenses, fees or costs, (e) those for any possible economic loss or loss of consortium, (f) those for damages to reputation, and (g) those for any equitable remedy, all such rights and claims being hereinafter referred to as "Dalkon Shield-Related Claims."

34. The injunction referred to and described in Section 8.04 of the Plan is effective as provided in Article VIII of the Plan. Upon the entry of this Order, and except as otherwise expressly provided in the Plan, (a) all Persons (i) who have held, hold or may hold Claims, including, without limitation, Dalkon Shield Claims or Dalkon Shield Liquidated Claims, or (ii) who have held, hold or may hold Robins Common Stock, and (b) the Debtor, the Successor Corporation and any of their Affiliates, are hereby permanently enjoined on and after the Confirmation Date (A) from commencing or continuing in any manner any action or other proceeding of any kind with respect to any such Claim or any Dalkon Shield-Related Claim against the Debtor, its shareholders, the Successor Corporation, any of the Affiliates thereof (including, without limitation, AHP), the Trusts or any other Person or the property of the Debtor, the Successor Corporation, any of the Affiliates thereof, or of any other Person, (B) from the enforcement, attachment, collection or recovery by any manner or means of any judgment, award, decree or order against the Debtor, its shareholders, the Successor Corporation, any of the Affiliates thereof (including, without limitation, AHP), or any other person or the property of the Debtor, the Successor Corporation, any of the Affiliates thereof (including, without limitation, AHP), or any other Person with respect to any such Claim or any Dalkon Shield-Related Claim, (C) from creating, perfecting or enforcing any encumbrance of any kind against the Debtor, its shareholders, the Successor Corporation, any of the Affiliates thereof (including, without limitation, AHP), or any other Person or against the property of the Debtor, its shareholders, the Successor Corporation, any of the Affiliates thereof, or any other Person with respect to any such Claim or any Dalkon Shield-Related Claim, (D) from asserting any setoff, right of subrogation, or recoupment of any kind against any obligation due the Debtor, its shareholders, the

Successor Corporation, any of the Affiliates thereof (including, without limitation, AHP), or any other Person or against the property of the Debtor, its shareholders, the Successor Corporation, any of the Affiliates thereof (including, without limitation, AHP), or any other Person with respect to any such Claim or any Dalkon Shield-Related Claim, and (E) from any act, in any manner, in any place whatsoever, that does not conform to or comply with the provisions of the Plan, the Claims Resolution Facility and the Trust Agreements; provided, however, that such injunction shall not impair the rights of persons with Dalkon Shield Claims or Dalkon Shield Liquidated Claims from asserting Unreleased Claims. After properly electing trial by jury under Option 3 of the Dalkon Shield Claimants Trust Claims Resolution Facility, a Person shall, notwithstanding this injunction, be entitled to continue or commence a jury trial against the Claimants Trust for the purpose only of obtaining a judgment for compensatory damages against the Trust liquidating that Person's Dalkon Shield Claim so that it may be paid with other Allowed Dalkon Shield Personal Injury Claims in the ordinary course of the Trust's operations consistent with the provisions of the Claims Resolution Facility and such other procedures as the Trustees may establish pursuant to the Claims Resolution Facility. The holder of any such judgment is hereby permanently enjoined from executing against either of the Trusts or their assets.

35. The provisions of this Order are non-severable and mutually dependent.

36. The assumption by the Debtor of all executory contracts (including, without limitation, product, patent, trademark, and know-how licenses) and unexpired leases which it has sought to assume under Section 9.02 of the Plan is approved in all respects; provided, however, that the Court shall retain jurisdiction to determine any dispute as to the amount of

defaults, if any, required to be cured under Section 365(b)(1) of the Code with respect to any such executory contract or unexpired lease.

37. Upon consummation of the Merger, all executory contracts (including, without limitation, product, patent, trademark, and know-how licenses) and unexpired leases assumed by Robins pursuant to an order of this Court during the Case or under Section 9.02 of the Plan shall be assigned and transferred to, and remain in full force and effect for the benefit of, the Successor Corporation notwithstanding any provision in such contracts or leases (including those described in Section 365(b)(2) and (f) of the Code) that prohibits such assignment or transfer or that enables or requires termination of such contracts or leases based on the Merger.

38. The adversary proceeding no. 87-1005-R, styled "Dalkon Shield Claimants' Committee, in its own right and on behalf of A. H. Robins Company, Inc., v. E. Claiborne Robins, E. Claiborne Robins, Jr. William L. Zimmer III, and McGladrey, Hendrickson & Pullen," is dismissed with prejudice, and the defendants named therein shall be discharged and released from all liability to Robins for all matters which were alleged or which could have been alleged in such complaint, upon payment of the Robins Family Contribution (with each side to bear its own costs).

39. The contested matter in the Case, filed August 3, 1987, regarding the helicopter owned by Robins shall be dismissed with prejudice upon payment of the Robins Family Contribution (with each side to bear its own costs), and, at such time, the clerk shall and is hereby directed to pay the sum deposited by E. Claiborne Robins Jr. into the Registry of the District Court in connection with such contested matter, together with any earnings thereon, to Robins, and that in exchange for such payment, E. Claiborne Robins Jr. shall be discharged and

released from all liability to Robins for those matters which were alleged or could have been alleged in said contested matter.

40. The Claims evidenced by the proofs of claim filed by or on behalf of present and former officers and directors of Robins for indemnification and contribution with respect to acts or omissions related to the Dalkon Shield are Allowed Claims assertable against the Other Claimants Trust, except that the indemnification and contribution claims of E. Claiborne Robins and E. Claiborne Robins Jr. shall become Allowed Claims assertable against the Other Claimants Trust only upon payment of the Robins Family Contribution, which Contribution shall not be refundable or repayable, directly or indirectly, by the Trusts or either of them.

41. The medical, diability, and life insurance benefits and coverage for all retired and disabled former employees of Robins, and their eligible dependents, who were entitled to receive such benefits and coverage on August 21, 1985, or who have since become entitled to receive such coverage and benefits, shall continue and be fully paid, and all defaults in the payment of such benefits shall be cured, as if this Case had never been commenced.

42. The Claims listed on Exhibit A to the Late Claim Objection and on praecipes dated April 29, 1988, June 21, 1988, July 12, 1988, and July 16, 1988, ("Late Claims") are disallowed, without prejudice to any rights of holders of those Claims created by Sections (G)(14) or (G)(15) of the Claims Resolution Facility, and holders of such Late Claims were and continue to be barred from voting Late Claims on the Plan.

43. Robins may file objections to allowance of any Claim not heretofore objected to or amendments to its schedules within 120 days from the date hereof, unless such time period is ex-

tended by order of the Court, and Robins shall pursue such objections diligently.

44. Effective on the Confirmation Date, the duties of the Creditors' Committee, the Dalkon Shield Claimants Committee, the Future Claimants' Representative, and the Equity Security Holders' Committee (collectively, the "Official Committees") will terminate, except with respect to any appeal of an order in the Case, fee applications, and any matters related to any proposed modification of the Plan. The duties of the examiner in this Case shall not cease on the Confirmation Date, but shall be subject to further instruction or order of the Court. Compensation for services rendered, and reimbursement for expenses incurred, by the examiner in this Case, the Official Committees (or any of them), or any professional person employed by Robins, the examiner in this Case or the Official Committees (or any of them) under Section 327 or 1103 of the Code shall be paid by Robins or the Successor Corporation, as the case may be, subject to approval of this Court; provided, however, that the Successor Corporation shall not be liable for any fees or expenses incurred after the later of the Consummation Date or the final disposition of any appeals or matters related to proposed modifications of the Plan.

45. This Court shall retain jurisdiction in accordance with the terms of the Plan, the other provisions of this Order, and Section 1142 of the Code.

46. Notwithstanding Section 8.09 of the Plan or any provision of the Order, Robins and the other parties to the Ross Case may, and are hereby directed to, take such steps as are necessary to obtain approval of the Class Action Settlement by the Class Action Court so that the condition to consummation of the Plan set forth in Section 7.02(d) of the plan can be fulfilled expeditiously; provided, however, that the Class

Action Settlement shall not be implemented, and the Class Action Settlement Fund shall not be released, until the Consummation Date.

Dated: Richmond, Virginia
July 25, 1988

BY THE COURT

/s/ Robert R. Merhige, Jr.
United States District Judge

WE ASK FOR THIS:
SKADDEN, ARPS, SLATE, MEAGHER & FLOM

By: /s/ Dennis J. Drebsky
(A Member of the Firm)
Attorneys for the A. H. Robins Company, Incorporated, Debtor and Debtor-in-Possession

919 Third Avenue
New York, New York 10022-9931
(212) 735-3000

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*All capitalized terms not defined herein shall have the meanings ascribed to them in the Debtor's Sixth Amended and Restated Plan of Reorganization, dated March 28, 1988.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

IN RE:	)	
A. H. ROBINS COMPANY,	)	
INCORPORATED,	)	Chapter 11
Debtor.	)	Case No. 85-01307-R
	)	(Retained Proceeding)
Employer's Tax Identification	)	(Judge Merhige)
No. 54-0486348	)	

MEMORANDUM IN RE CONFIRMATION ORDER

On August 21, 1985, A. H. Robins Company, Incorporated ("Robins") filed its petition for reorganization relief pursuant to 11 U.S.C. §§ 101 *et seq.*(the "Bankruptcy Code"). On that same day, this Court, upon representation that the major aspect of the case required the services of an Article III judge, withdrew the reference of this case to the Bankruptcy Court excepting for limited matters, thus retaining original jurisdiction in the District Court. *See Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

By agreement, the undersigned, with few exceptions, conducted all proceedings jointly.

During this entire case, despite objections by interested parties, Robins was, pursuant to 11 U.S.C. § § 1107 and 1108, permitted to and did manage its affairs as debtor-in-possession with monitoring by a court-appointed Examiner.

A full appreciation of the circumstances leading to the Court's instant consideration of the feasibility of the Debtor's "Sixth Amended and Restated Plan of Reorganization" in support of its motion for confirmation necessitates a condensed recitation of the events leading both to the petition of August 21, 1985 and to the matter now under consideration.

Background

In June 1970, Robins, a pharmaceutical enterprise, engaged in the research, development, manufacturing, and marketing of prescription drugs and health care products on its own behalf through subsidiaries located both in the United States and in over 100 foreign countries, purchased from the Dalkon Corporation an intrauterine birth control device marketed as a Dalkon Shield.

The very essence of Robins' business operations involves major and consistent interaction with doctors, hospitals and other health care providers. The goodwill of individuals and organizations in the profession and business of health care is a major factor in the financial viability of the Debtor.

Robins and its subsidiaries distributed almost five (5) million Dalkon Shields throughout the United States and foreign countries until June, 1974 when the product was withdrawn from the United States market, and early 1975 when foreign sales were discontinued.

By the mid-1970's, numerous lawsuits alleging injuries associated with the use of the Dalkon Shield were filed against Robins, its officers, directors, employees, as well as its insurer, Aetna Casualty and Surety Company ("Aetna") and various other co-defendants, including hospitals and physicians.

By the time of filing of the instant proceedings, Robins was faced with almost 6,000 lawsuits and claims arising from the Dalkon Shield, and had by that period of time, along with Aetna, paid approximately $530 million in settlements or in satisfying judgments arising from Dalkon Shield claims.

Additionally, in 1977, Robins and its directors and officers, including William L. Zimmer, III, E. Claiborne Robins and E. Claiborne Robins, Jr., became the subject of a class action suit

in 1977 by stockholders Kalman and Anita Ross, based on the alleged dissemination of false and misleading information, and failure to disclose other information, concerning the Dalkon Shield to purchasers of Robins' stock during the period of March 8, 1971 through June 28, 1974 (the "Ross Class Action"). The parties to the Ross Class Action agreed upon a settlement in 1984 pursuant to which Robins deposited $6.9 million with its attorneys under an escrow agreement (the "Escrowed Funds") and submitted the settlement in that amount to the Class Action Court. The Class Action Court had not ruled on the proposed settlement when Robins commenced its reorganization case on August 21, 1985.

In accord with the Ross Order, this Court authorized named plaintiffs Kalman and Anita Ross to vote as class representatives either acceptance or rejection of the plan on behalf of the Ross Class Action plaintiffs.

Under the Plan, and to resolve a controversy regarding whether the Escrowed Funds are property of the estate, the claim of the plaintiffs in the Ross Class Action is limited to the Escrowed Funds.

As the Court has indicated, Aetna had been Robins' insurer covering compensatory damages arising from the use of the Dalkon Shield prior to March, 1979.

Robins and Aetna differed as to the extent of the coverage to be afforded Robins under its policy with Aetna, and in 1979 Robins brought suit against Aetna in reference to Aetna's coverage of Dalkon Shield alleged claims (the "Coverage Litigation"). Thereafter, Robins and Aetna entered into a settlement agreement wherein it was agreed that (a) Robins receive $70 million in additional insurance coverage, (b) Aetna would continue to handle and defend Dalkon Shield cases and claims on Robins' behalf and (c) certain releases were exchanged.

Aetna has filed in these proceedings a proof of claim seeking from the Debtor reimbursement of approximately $58 million and asserting as well, rights of contribution. Robins, in turn, has contended that it has available to it insurance coverage from Aetna in excess of Aetna's proof of claim.

The Court directed its Examiner to investigate the amount of insurance coverage available to Robins, including Aetna's, and to report on the propriety of the settlement between Aetna and Robins in the Coverage Litigation. After a lengthy investigation, the Examiner, Ralph Mabey, a former Bankruptcy Judge, concluded that the settlement of the Coverage Litigation was an arms-length, good faith resolution of the issues involved, and that the amount of the settlement was reasonable as a resolution of the disputed claims.

As the Court has indicated, the consequences of Robins' Dalkon Shield venture were devastating both from a financial aspect as well as from the physical suffering alleged to have resu'ted to hundreds of thousands of claimants, some of whom have established their claimed injuries as evidenced by a number of judgments rendered against Robins amounting to millions of dollars.

The evidence before the Court is that, immediately prior to the reorganization filing, the financial drain upon Robins' assets, coupled with declining employee morale and productivity, as well as Robins' inability to borrow money at a time of a serious cash flow deficiency, led to a late determination to seek protection under the Bankruptcy Code.

Promptly following the filing for reorganization, the Court authorized and approved the appointment of a number of official committees. Each of the committees, with court approval, retained counsel as well as other experts.

The official committees, Equity Security Holders' Commit-

tee, the Unsecured Creditors' Committee, the Dalkon Shield Claimants' Committee, a Future Claimants' Representative (collectively, the "Official Committees"), the U.S. Trustee, the United States Attorney, as well as other interested parties each contributed their views, with few exceptions, on literally every issue which arose during these proceedings.

Because the distribution of the Dalkon Shield to its ultimate users was not made by Robins, hence to a great extent claimants were unknown to Robins, a method of notice of the proceedings had to be devised which would conform to the requirements of due process.

On November 21, 1985, the Court entered an order (the "Bar Date order") establishing April 30, 1986 as the deadline for filing claims against Robins (the "Bar Date"). The claim filing process required those persons wishing to assert a Dalkon Shield claim to file initially, on or before the Bar Date, only a post card containing their name, address and intention to assert a claim ("post card claims"). The Bar Date order established the form of notice to be distributed to Dalkon Shield claimants, trade creditors and stockholders and authorized Robins to undertake an international campaign for notifying all unknown claimants of the Bar Date and informing them of the procedures for filing a claim. The Bar Date order further provided that questionnaires would be sent to all persons or entities asserting Dalkon Shield claims against Robins in order to obtain necessary additional information relating to such claims.

Pursuant to the Court's order, Robins embarked on a massive international campaign for notifying all potential creditors and claimants not only of the Bar Date, but informing them of the uncomplicated method for filing a claim.

Persons who had used the Dalkon Shield but had not yet

manifested an injury were encouraged to take the necessary step to assert a claim even though not yet manifested. The Court's method of notification subsequently met with approval by the United States Court of Appeals for the Fourth Circuit. *See Vancouver Women's Health Collective Society v. A. H. Robins Co.*, 820 F.2d 1359 (4th Cir. 1987).

Pursuant to the Bar Date order, the Clerk of the Bankruptcy Court sent to each person who filed a timely post card claim a two-page questionnaire (the "Court Questionnaire") designed to elicit basic claim information from each potential Dalkon Shield claimant. The Court established June 30, 1986 as the deadline for domestic claimants, and July 30, 1986 as the deadline for foreign claimants, to return the Court Questionnaire. The District Court later extended the Questionnaire response deadline for claimants residing in Taiwan to October 6, 1986.

In excess of 175,000 Dalkon Shield claimants timely returned the Court Questionnaire.

By order entered May 5, 1987, the Court directed Robins to mail a supplemental notice and second questionnaire (the "Second Questionnaire") to each of those Dalkon Shield claimants who had not returned the first Court Questionnaire. This supplemental notice required that the Second Questionnaire be returned to the Clerk of the Bankruptcy Court no later than July 15, 1987 for domestic Dalkon Shield claimants' and August 12, 1987 for foreign Dalkon Shield claimants, and stated that failure to do so would bar the Dalkon Shield claimant from pursuing a claim, Approximately 21,000 Dalkon Shield claimants timely returned the Second Questionnaire.

By order entered July 10, 1987, the Court disallowed Dalkon Shield claims of domestic Dalkon Shield claimants who did not timely return the Court Questionnaire or the Second Ques-

tionnaire. The July 10, 1987 order provided, however, that the Court would entertain written requests for reconsideration of the order of disallowance if such requests were filed with the Bankruptcy Court on or before September 11, 1987. The Court has conducted hearings on such written requests.

A number of efforts were made primarily by the Claimants Committee seeking an order, pursuant to 11 U.S.C. § 1104 (1987), for the appointment of a Trustee to manage the A. H. Robins Company. After a full hearing, the Committee's motion was denied. The Court, though finding civil contempt, held that appointment of a Trustee was neither necessary nor desirable. As the United States Court of Appeals noted in this context, "a policy of flexibility pervades the bankruptcy code with the ultimate aim of protecting creditors." *Committee of Dalkon Shield Claimants v. A. H. Robins Co.*, 828 F.2d 239, 242 (4th Cir. 1987).

It should be noted, as well, that the Court's Examiner had diligently monitored the business activity of the Debtor, The Court was aware that, being the beneficiary of the stay imposed by 11 U.S.C. § § 362(a)(1) and 362(a)(3) as well as that imposed by the Court pursuant to 11 U.S.C. § 105 and 28 U.S.C. § 1334, *see Oberg v. Aetna Casualty & Surety Co.*, 828 F.2d 1023 (4th Cir. 1987), *cert. denied*, 108 S.Ct. 1246 (1988), the Debtor had once again become, at least under the umbrella of the stay, financially viable.

To have, in the absence of fraud or mismanagement, replaced the existing management with a Trustee would have been to expose thousands of potential claimants to danger of a financial disaster.

The Court was even then aware that the nature of the existing claims was such as to reasonably preclude payment by Robins, out of its profits, of sums sufficient to satisfy the outstanding claims in any reasonably foreseeable future.

The Court concluded, after many conferences (in excess of 225) on a myriad of issues, and formal argument by the parties, as well as having considered its Examiner's views, that only an estimation of the personal injury claims en masse would bring forth additional prospective purchasers or those interested in merging with Robins. The Court was of the view that any such party would not be willing to accept less than a cap on the value of the claims.

Interestingly, the Court's view in this regard appears to have been fortuitous for evidence recently presented establishes that the Debtor, under protection of the stay, had its greatest financial year in 1986 when its profits *before taxes* were approximately $172 million. As the Court will elaborate infra, the amount to be received under the Plan, which the Court finds fair and feasible, represents a figure which could not be recovered from Robins, from its profits, in decades, assuming, as the evidence shows cannot reasonably be assumed, Robins could remain economically viable. Indeed, under the present Plan, the sums available to Dalkon Shield claimants represent a figure in excess of the Company's liquidation value.

The Court concluded an estimation was appropriate—an action which Robins had been advocating since February 1986 and which the Equity Security Holders Committee had moved for on May 18, 1987.

Reasonably early on in the proceedings, the Court had appointed Professor Francis E. McGovern as the Court's expert to develop in cooperation with the Dalkon Shield Claimants' Committee, the Unsecured Creditors' Committee, the Future Claimants' Representative, the Equity Security Holders' Committee, Robins and Aetna, a reliable data base to aid in analyzing and determining the aggregate value of Dalkon Shield claims. Each of the foregoing parties, including Professor McGovern, retained experts to assist it in the col-

lection, evaluation and analysis of data regarding Dalkon Shield claims (the "Data Collection Process").

The Data Collection Process, which lasted over a year and a half, resulted in the compilation of an extensive data base which was made available to Robins, the Official Committees, Aetna, and their respective experts for their use in connection with the estimation motions.

The Estimation Hearing on the motions of Robins and the Equity Security Holders' Committee (the "Estimation Motions") was set for November 5, 1987, and notice of the Estimation Hearing and the matters to be considered at it was sent by the Clerk of the Court to all parties in interest.

The parties each conducted extensive discovery in preparation for the Estimation Hearing.

On November 5, 1987, the Estimation Hearing commenced and concluded on November 11. At the hearing, the parties in interest presented their estimates and were heard regarding the aggregate amount of Robins' Dalkon Shield liability and the propriety of a one claim/one vote procedure for voting purposes to determine whether a class or classes of Dalkon Shield claims had or had not accepted a plan. The Court heard extensive medical, statistical, epidemiological, and other expert testimony. Numerous briefs, memoranda and expert reports were submitted to the Court. Parties in interest requesting to be heard were heard.

The estimates of Robins, Aetna and the Official Committees were as follows:

Robins — $800 million to $1.3 billion
Equity Security Holders' Committee — $1.03 billion
Unsecured Creditors Committee — $1.54 billion

Dalkon Shield Claimants' Committee — $4.2 billion to $7.0 billion
Aetna — $2.2 billion to $2.5 billion

In addition, the expert retained by the Future Claimants' Representative, estimated the value of so-called "future claims" to be approximately $660 million over a fourteen year period.

During the course of the Estimation Hearing, the Court requested experts for various parties in interest to recalculate their estimates using various assumptions, different from those used by those experts in their original analyses.

The Court, having reviewed the testimony, arguments, expert reports, memoranda and briefs, and having observed the witnesses and considered the weight to be given to their respective testimony as developed by both direct and cross examination as well as the assumptions, methodology and reasoning employed by the parties in reaching their estimates and various legal theories for reinstatement of untimely filed claims, announced and now reconfirms its finding that the sum of $2.475 billion, payable over a reasonable period of time, is sufficient to pay in full all Dalkon Shield personal injury claims as well as expenses of the Trusts established to administer the claims (the "Estimate").

The viable claims now pending are in excess of 195,000, Any attempt to evaluate each individual claim for purposes of voting on the Debtor's Plan of Reorganization would, as a practical matter, be an act of futility, and would be so time consuming as to impose on many, many deserving claimants further intolerable delay all not only to their detriment, but to the detriment of the financial well being of the estate as well. The Court is intellectually and morally satisfied that the placing of a nominal value on each claim for voting purposes was

appropriate, and the Court so ordered under date of March 21, 1988. *Cf. Kane v. Johns-Manville Corp.*, 843 F.2d 636, 651 (2d Cir. 1988) (Miner, J., concurring) (delay entailed by estimation of individual claims for voting purposes would be fatal to plan and to recovery for claimants).

No offer approximating the Court's estimated $2.475 billion had been forthcoming until the Court's public announcement of its view. Within a matter of days, at least two offers were forthcoming.

By far, the offer by American Home Products Corporation (AHP), made in December 1987, was the highest and promised the quickest pay out to the claimants. AHP proposed a merger of Robins with its newly-acquired subsidiary, AHP Subsidiary (9) Corporation, premised upon (i) full payment of Dalkon Shield claimants in accordance with the Estimate, and (ii) the belief that AHP, AHP Subsidiary (9) Corporation, Robins, the Successor Corporation and their personnel would be freed from any involvement in litigation or claims regarding the Dalkon Shield. The Court deems AHP's concern in this regard to be well taken. An investment of the magnitude involved here requires all reasonable effort to, consistent with the law, end all Dalkon Shield litigation, including the class action against Aetna ("*Breland* matter").[1]

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[1]Seven Dalkon Shield claimants filed a complaint against Aetna in which they sought certification of a broad class of Dalkon Shield claimants. *Glenda Breland v. Aetna Casualty and Surety Company*, Civil Action No. 86-0315-R. The class was certified and the parties negotiated a settlement. An evidentiary hearing was held on the reasonableness, adequacy and fairness of the proposed settlement. The Court subsequently studied the affidavits and exhibits submitted and determines that the proposed settlement is reasonable, adequate, fair and in the best interests of Breland plaintiffs. An order and a memorandum will issue shortly.

A "Qualified *Breland* Settlement" is a condition precedent to the Debtor's Plan of Reorganization.

In connection with the "Qualified *Breland* Settlement" and the Plan, Robins and Aetna will mutually release each other from claims relating to the Aetna insurance, Aetna's Proof of Claim will be disallowed, and Aetna will provide monies and insurance policies pursuant to the terms of a Qualified Breland Settlement, all of which, in the Court's view, will add to the sums available to Dalkon Shield claimants.

The compensation available for Dalkon Shield claims pursuant to the Plan and the merger with AHP Subsidiary (9) Corporation exceeds the Estimate as well as the liquidation value of the Debtor.

AHP is primarily engaged in the health care, pharmaceutical and consumer product business. For the year 1987, AHP had sales in excess of $5 billion and net income in excess of $845 million. In the first quarter of 1988, AHP had in excess of $1 billion in available cash or cash equivalents. AHP has in place a $2 billion line of credit with a group of major money center banks which will be available to meet funding obligations under the Plan. At the end of the first quarter of 1988, Robins had approximately $375 million in available cash. After notice and hearing, and authorization by the District Court, Robins, AHP, and AHP Subsidiary (9) Corporation executed and delivered the merger agreement annexed to the Plan as of March 21, 1988.

The Plan

Robins filed its Fifth Amended and Restated Plan of Reorganization and its Fifth Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code (the "Fifth Amended Disclosure Statement") on February 11, 1988.

Robins gave in excess of 30 days written notice of the March

21, 1988 date for the hearing on the adequacy of the Fifth Amended Disclosure Statement to all parties entitled to receive notice pursuant to Bankruptcy Rule 3017(a) and the orders of this Court.

In response to certain objections filed to the Fifth Amended Disclosure Statement, and pursuant to negotiations among the major parties-in-interest in Robins' reorganization case, Robins agreed to modify the Fifth Amended Disclosure Statement.

Robins filed its Sixth Amended and Restated Disclosure Statement pursuant to Section 1125 of the Bankruptcy Code (the "Disclosure Statement"), incorporating those modifications, on March 28, 1988, Robins filed its Sixth Amended and Restated Plan of Reorganization (the "Plan") on the same date.

After notice and a hearing on March 21, 1988, the District Court approved the Disclosure Statement as containing adequate information as defined in Section 1125 of the Bankruptcy Code by order dated April 1, 1988 (*nunc pro tunc*) (the "Disclosure Statement Order").

On or before April 25, 1988, Robins transmitted copies of (a) the Disclosure Statement (including the plan as an exhibit thereto), (b) the "Notice of Hearing on (i) Confirmation of Debtor's Plan of Reorganization, (ii) Debtor's Request for Disallowance of Punitive Damages, and (iii) other matters set forth in Section 7.02(a) of Debtor's Plan of Reorganizaton" (the "Notice of Confirmation Hearing"), (c) the Disclosure Statement order (without Exhibit A), (d) the Court's March 21, 1988 "Order Temporarily Allowing and Estimating Dalkon Shield Claims for Voting Purposes Only" (the "Voting Order"), (e) letters from the United States District Court, the Official Committee of Dalkon Shield Claimants, Robins,

the Official Unsecured Creditors' Committee, and counsel to the Official Committee of Equity Security Holders (the "Letters"), and (f) ballots for the purpose of voting to accept or reject the Plan ("Ballots") to all Dalkon Shield Claimants, creditors and equity security holders as provided in the Disclosure Statement Order and the Court's April 18, 1988 "Order Under Bankruptcy Rule 3018 Authorizing Class Representatives to Accept or Reject Plan on Behalf of Class Action Plaintiffs" (the "Ross Order").

Robins filed and transmitted to holders of untimely filed Class 3A Dalkon Shield claims an "Objection and Notice of Hearing on Objection of A. H. Robins Company, Incorporated, Debtor and Debtor-in-Possession, Under 11 U.S.C. § 502(a) and Bankruptcy Rules 3003(c)(2) and 3007 to Certain Untimely Dalkon Shield Claims" (the "Late Claim Objection"), seeking an order disallowing certain untimely filed Class 3A Dalkon Shield Claims and providing that holders of such claims are barred from voting such claims on the Plan.

Robins filed and transmitted to holders of timely filed and untimely filed Class 3A and 38 Dalkon Shield claims an "Objection and Notice of Hearing on Objection of A. H. Robins Company, Incorporated, Debtor and Debtor-in-Possession, Under U.S.C, § 502(a) and Bankruptcy Rule 3007 to Dalkon Shield Claims" (the "Punitive Damage and General Objection"), seeking an order providing that any portion of any unliquidated Dalkon Shield claim that is or may be for punitive or similar damages is disallowed and that no Dalkon Shield claim is allowed except and to the extent provided for in the Plan and the Voting Order. Robins served the Punitive Damage and General Objection on holders of timely filed Class 3A and 38 Dalkon Shield claims along with the Disclosure Statement and related materials described in paragraph 7 above on or before April 25, 1988.

The Notice of Confirmation hearing was transmitted to *Breland* Class B members in connection with the mailing done by the *Breland* plaintiffs, as described in the report filed with the Court on July 6, 1988.

Robins gave supplemental publication notice of the confirmation hearing and matters to be considered at it in accordance with this Court's order of April 29, 1988 as modified by order dated May 18, 1988 (the "Publication Notice Order").

On or before June 16, 1988, Robins transmitted the Notice of Confirmation Hearing and the Disclosure Statement to various persons who are parties to unexpired leases or executory contracts with Robins.

Robins transmitted copies of the "Notice of the Date On or Before Which Each Person Retained or That May Request Compensation and/or Reimbursement of Expenses in This Case Pursuant to Sections 327, 328, 330, 503(b) or 1103 of The Bankruptcy Code Must File a Binding Estimate of the Maximum Amount of Allowance of Compensation and Reimbursement of Expenses to be Requested in This Case" (the "Fee Cap Notice") to various persons retained, or that might seek compensation or reimbursement of expenses from the Debtor's estate pursuant to Sections 327, 328, 330, 503(b) or 1103 of the Code (the "Noticed Professionals") pursuant to the Court's June 13, 1988 "Order Establishing and Approving Form and Method of Notice of The Date On or Before Which Each person Retained or That May Request Compensation and/or Reimbursement of Expenses in This Case Pursuant to Section 327, 328, 330, 503(b) or 1103 of The Bankruptcy Code Must File a Binding Estimate of The Maximum Amount of Allowance of Compensation and Reimbursement of Expenses To be Requested in This Case" (the "Fee Cap Order").

Ballots for the acceptance or rejection of the Plan were not solicited prior to entry of the Disclosure Statement Order or after July 11, 1988.

Certification of the results of the balloting by The Corporation Trust Company ("CT") and Robins were filed with this Court on July 18, 1988.

Various objections to confirmation of the Plan (raising, among other things, challenges to the jurisdiction of this Court to grant the relief provided for in the Plan and the order confirming the plan, the releases and injunctions provided for in the Plan, the disallowance of punitive damages, and the treatment of Dalkon Shield claims and equity interests under the Plan) were filed, litigated and considered by this Court.

A number of objections were filed on behalf of claimants who actually voted in favor of the proposed Plan or who did not vote. While Robins objected to the standing of these objections, the Court, nevertheless, gave them full consideration.

After the conclusion of voting on the Plan, Robins filed certain technical modifications to the Plan on July 15, 1988 and served a "Motion Pursuant to Bankruptcy Rule 3019 for an Order Finding that the Sixth Amended and Restated Plan of Reorganization purposed by A. H. Robins Company, Incorporated, Debtor and Debtor-in-Possession, As Technically Modified, Does Not Adversely Affect Treatment of Claims or Interests") (the "Technical Modification Motion"), on July 15, 1988. The modifications to the Claimants Trust, the Claims Resolution Facility and Sections 4.03, 5.01 and 6.07 of the Plan set forth in the Technical Modification Motion (a) permit the creation of the Claimants Trust before the Consummation Date so that the "start-up" payment contemplated by Section 6.07 of the Plan can be made and administered and (b) contain other technical corrections. There have been no

modifications which adversely affect the treatment of claims or interests under the Plan. The Court concludes that the modifications do not require resolicitation of acceptances or rejections, nor do they require that holders of claims or interest be afforded an opportunity to change previously cast acceptances or rejections of the Plan.

The Plan, incorporating the merger agreement with AHP and AHP Subsidiary (9) Corporation, is the first consensual agreement in this case for the treatment of all claims and interests. The Plan is truly the considered result of long and dedicated negotiations between Robins, AHP, and the official committees. Assisting as well was the Court's Examiner and when called upon, the Court.

The Plan has been accepted overwhelmingly in writing by the creditors and security holders whose acceptance is required by law in accordance with the special voting procedures approved by this Court's Ross Order and Voting Order. Over 140,000 votes, approximately 72% of the total class, were cast in regard to Class 3A claims (Dalkon Shield Personal Injury Claims). Ballots accepting the Plan were timely received from 94.38% of all Dalkon Shield claimants who voted, representing more than two-thirds in number and amount of that class.

With respect to Class 3B claims (Dalkon Shield Other Claims), ballots accepting the Plan were timely received from 97.91% of all Dalkon Shield claimants actually voting in such class, representing more than two-thirds in number and amount of that class.

With respect to Class 8 Claims (Financial Institution Claims), ballots accepting the Plan were timely received from holders of at least two-thirds in amount and more than one-half in number of creditors actually voting in such class.

With respect to Class 9 Claims (Securities Claims), a ballot accepting the Plan was timely received from the official class representative of the plaintiff class in the Ross Case, such ballot representing one-hundred percent in amount and number of creditors in such class pursuant to the Ross Order.

With respect to Class 10 Interests (Common Stock Interests), ballots accepting the plan were timely received from holders of at least two-thirds in amount of equity security interests actually voting in such class.

With respect to Class 11 Interests (Common Stock Option Interests), ballots accepting the plan were timely received from holders of at least two-thirds in amount of equity security interests actually voting in such class.

With respect to all other classes, they are not impaired.

The Plan complies with the applicable provisions of the Code.

Robins solicited acceptances of the Plan in good faith.

The identity, qualifications, and affiliations of the persons who are to be directors or officers, or voting trustees, if any, of Robins or of the Successor Corporation after confirmation of the Plan have been fully disclosed, to the extent known, and the appointment of such persons to such offices, or their continuance therein, is consistent with the interests of Robins' creditors and equity security holders and with public policy.

The identity of any insider that will be employed or retained by Robins or the Successor Corporation and his or her compensation have, to the extent known, been fully disclosed. No determination at this time has been made to change Robins' existing management or compensation structure immediately after the Confirmation Date.

As the Court has concluded, the instant Plan, unlike a usual

conversion to Chapter 7 for liquidation, will afford all creditors' payment in full and each holder of a claim or interest will receive or retain under the Plan property of a value, as of the Effective Date, that not only is as much as the amount that such holder would receive or retain if Robins were liquidated under Chapter 7 of the Bankruptcy Code on that date but substantially more.

The payments into the Trusts provided for under Sections 5.01(b), 5.02(b) and 6.07 of the Plan are sufficient to pay all Allowed Dalkon Shield Personal Injury Claims, Allowed Dalkon Shield Liquidated claims and costs and expenses of the Trusts in full.

All fees payable under 28 U.S.C. § 1930 have been paid, and there are no rate changes provided for in the Plan that require the approval of any governmental regulatory commission. A conversion to Chapter 7 would be financially inexpedient to both the Debtor and the creditors in that it would have a negative effect on employees' morale and ability to maintain market share, hence diluting the value of operating assets.

The Robins Family Contribution is valuable consideration for the releases contained in Section 8.03 of the Plan, the injunction provided in Section 8.04 of the Plan, other terms and conditions of the Plan, and the benefits of the Other Claimants Trust.

The moneys and insurance policies anticipated to be contributed by Aetna pursuant to the terms of the Qualified *Breland* Settlement constitute valuable consideration for the inclusion of Aetna within the scope and protection of the releases contained in Section 8.03 of the Plan and the injunction provided in Section 8.04 of the Plan.

The scope and protection of the releases and injunctions provided in Section 8.03 and 8.04 of the Plan are necessary and essential to avoid irreparable harm to the estate.

On June 13, 1988, this Court entered the Fee Cap Order capping the aggregate amount of Fee Claims of Noticed Professionals at the amounts set forth in the binding estimates filed by them on or before July 13, 1988, in accordance with the Fee Cap Order.

The equitable treatment of all Dalkon Shield Personal Injury Claimants, rehabilitation of the Debtor, and the success of the merger with AHP Subsidiary (9) Corporation requires the absolute termination of piecemeal litigation relating to or arising from the Dalkon Shield and the creation of a single facility.

The Plan and the transactions contemplated by it do not provide for and, when consummated, will not constitute the liquidation of all or substantially all of the property of the Debtor's estate.

The releases and injunction provided in Section 8.03 and 8.04 of the Plan (collectively, the "Channeling Provisions") are an integral part of the compromises and settlements incorporated in the Plan. They are essential to the viability of the merger with AHP Subsidiary (9) Corporation and the post confirmation operations of that corporation and provide for the successful implementation of the Plan and provide equality of treatment of similarly situated creditors, reorganization of and a "fresh start" for the Debtor, and a consensual plan of reorganization.

Feasibility

Section 1129 of the Code authorizes confirmation of a plan only upon inclusion therein of specified conditions.

The Court is satisfied that the instant Plan encompasses each of the § 1129 requirements and each has been addressed.

A fair reading of the Plan discloses that the feasibility of same is premised on continuing supervision by the Court of each of the Trusts. Feasibility of this Plan and the law requires this supervision to assure the accuracy of the Court's estimate, the full payment of all Dalkon Shield personal injury claims and allowed Dalkon Shield liquidated claims and to reduce the threat of personal liability of the Trustees and personnel of the Trusts. After the Trusts are established, the Trusts will operate independently of Robins and the duties of the Official Committee of Dalkon Shield Claimants and of the Future Claimants' Representative will have terminated except with respect to appeals, fee applications, and matters related to proposed modifications of the plan. Under these circumstances, supervision of the Trusts by the Court is necessary and appropriate. Court supervision of the Trusts is sufficient under the facts of this case in that the Court is empowered under the law to approve all payments by the Trusts for services, costs and expenses in connection with the administration of the Trusts and to approve the employment by the Trusts of professionals and administrators, and otherwise to supervise the Trusts as provided for or allowed by the Plan and applicable law.

Sections 105, 1129(a)(4), and 1142 of the Bankruptcy Code and Sections 157 and 1334 of Title 28 of the United States Code as well as principles of equity empower and require the Court to maintain a continuing supervision in the manner aforesaid.

Additionally, the Court's supervision of the Trusts is consistent with the Plan and the Trusts. Section 3.03(c) of the Claimants Trust empowers the Court to remove Trustees of the Claimants Trust without a showing of cause. Section 3.04(a) of the Claimants Trust empowers the Court to appoint a successor Trustee of its own nomination if the remaining Trustees fail to nominate a successor Trustee that is approv-

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Summary

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or indirectly, on any theory of law, including, without limitation, any theory of successor or transferee liability.

Robins' insurance policies, and the coverage thereunder, are property of the Debtor's estate under 11 U.S.C. § 541.

For the reasons set forth in the opinion to follow, unliquidated claims for punitive damages are disallowed.

Based on the facts of this case, in a hypothetical liquidation of the debtor under Chapter 7 of the Bankruptcy Code, no proceeds would be available for the payment of punitive damages or distribution to shareholders.

Nothing in the Bankruptcy Code, however, precludes payments in lieu of punitive or similar damages as part of a confirmed plan of reorganization as has been accepted by all impaired classes of claims and interests affected thereby.

Section 1334 of Title 28, Section 105 of the Bankruptcy Code and the general equitable powers of this Court confer upon it jurisdiction to enjoin proceedings in other courts, enjoin parties from commencing or continuing litigation, and to otherwise approve the channelling provisions in order to ensure: (i) the efficient administration of Robins' estate; (ii) the efficient administration of the Trusts; (iii) the systematic evaluation and payment of Dalkon Shield claims in an orderly, fair manner, applying the same rules to all; (iv) that the bulk of the funds in both Trusts are made available for the payment of Dalkon Shield personal injury claims pursuant to the same method of claims evaluation; (v) minimization of expenditures and transaction costs payable from the Other Claimants Trust, for protracted litigation of questionable value against third parties; (vi) successful consummation of the Plan; (vii) that Dalkon Shield personal injury claimants do not bypass the Claims Resolution Facility, to the detriment of other Dalkon Shield personal injury claimants; (viii) equality of distribution to Dalkon

Shield personal injury claimants; and (ix) rehabilitation and reorganization of Robins, free from direct and indirect involvement in further Dalkon Shield litigation.

Payments on liquidated claims or to holders of equity security interests before unliquidated and/or disputed claims are liquidated are, in this instance, appropriate and do not violate the Bankruptcy Code.

The Court should and does accept the business judgment of the Debtor regarding the assumption of executory contracts absent unusual circumstances which are not present here.

In order to effectuate the Plan and provide for finality, the Court may allow indemnification, contribution, or reimbursement claims and provide that said claims be satisfied by the Other Claimants Trust and by the protection of the releases and injunctions.

Assumption and assignment of Robins' outstanding executory contracts and unexpired leases are in the best interest of the estate.

The "absolute priority rule" and the other provisions of 11 U.S.C. § 1129(b) are inapplicable to this confirmation.

The modifications to the Plan set forth in the Technical Modification Motion are technical changes required to correct typographical errors and to provide that the $100 million start-up payment and distributions contemplated by Section 6.07 of the Plan and described in the Disclosure Statement can be made and implemented. As such, those modifications do not require that holders of claims or interests be afforded an opportunity to change previously cast acceptances or rejections of the Plan.

The AHP Common Stock to be issued in exchange for Robins Common Stock under the Plan is exempt from registra-

tion under state and federal law pursuant to section 1145(a)(1) of the Bankruptcy Code.

Except as provided in the Plan and Confirmation Order, the confirmation of the Plan will enjoin the commencement or continuation of any action, the employment of any process, and the doing of any act to collect, recover or offset any debt discharged by the Confirmation Order, by the Plan or by section 1141(d) of the Bankruptcy Code as a personal liability of Robins or its affiliates, or from property of Robins or its affiliates, whether or not discharge of any such debt is waived.

By virtue of confirmation of the plan, any judgment at any time obtained will be void to the extent that such judgment is a determination of the personal liability of Robins with respect to any debt discharged by the Confirmation Order, by the Plan, or by Section 1141(d) of the Bankruptcy Code, whether or not discharge of any such debt is waived.

Upon entry of the Confirmation Order, the terms of the Plan will be binding upon Robins, the Successor Corporation, the Trusts and any and all creditors and equity security holders of Robins, whether or not the claims or interests of such creditors or equity security holders are impaired under the Plan and whether or not such creditors or equity security holders have accepted the Plan.

Pursuant to Section 1146(c) of the Bankruptcy Code, the issuance, transfer or exchange of a security under the Plan or the revesting, transfer or sale of any real or personal property of Robins in accordance with the Plan will not be taxes under any state or local law imposing a stamp tax, transfer tax or similar tax.

This Court, as a court of equity whose jurisdiction is governed by equitable principles, and pursuant to Section 105 of the Bankruptcy Code, has the constitutional and statutory power

and authority to issue and enter the injunction and releases contained in the Plan. Due and timely notice of the injunction and releases has been given in a manner reasonably calculated under all the circumstances to apprise all those affected by the Plan and the Confirmation Order of the pendency of the hearing to consider the Plan, including the injunction and releases included therein, and afford all interested parties an opportunity to present their objections.

The Court may and will exercise its equitable power and authority to issue injunctive relief where there is a basis for concluding that reorganization or rehabilitation of Robins might be undermined and frustrated by the actions sought to be enjoined.

The Court has the power and duty to shift through the surrounding circumstances to prevent injustice or unfairness and has the power to and will, if required, create new remedies where those at law are inadequate.

The Court has the equitable and inherent power and authority to channel claims to a specific *res* and may limit the direct or indirect prosecution of such claims against Robins and prohibit parties in interest from attempting to circumvent the Plan and the orders of this Court.

In exercising its inherent equitable powers, the Court will, where justified, grant injunctive relief to prevent direct or indirect interference with the administration of the estate and facilitate the Robins reorganization effort to enable Robins to achieve the ultimate objectives of Chapter 11, reorganization and rehabilitation. The Court may enjoin or otherwise limit future litigation associated with this case that could undermine and/or frustrate the Plan or Robins' reorganization.

The foregoing constitutes the Court's findings of fact and conclusions of law. The provisions of the Order of Confirmation are non-severable and mutually dependant.

An appropriate Order will issue.

/s/ Robert R. Merhige, Jr.
United States District Judge

/s/ Blackwell M. Shelley
United States Bankruptcy Judge

Date *July 25, 1988*

JUDGEMENT

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

FILED
JUNE 16 1989
U.S. Court of Appeals
Fourth Circuit

No. 88-1750

In Re: A. H. ROBINS COMPANY, INCORPORATED

Debtor

ROSEMARY MENARD-SANFORD; KAREN VALENZUELA; CONSTANCE MILLER ENGELSBERG; NANCY LAURI ADAMS; CAROLYN HARRIS

Claimants—Appellants

v.

RALPH R. MABEY; THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; THE OFFICIAL UNSECURED CREDITORS COMMITTEE OF A. H. ROBINS COMPANY, INCORPORATED; STANLEY K. JOYNES, III, Legal Representative of the Future Tort Claimants of A. H. Robins Company, Incorporated;

Parties-in-interest

A. H. ROBINS COMPANY, INCORPORATED

Debtor—Appellee

No. 88-1754

In Re: A. H. ROBINS COMPANY, INCORPORATED

Debtor

DONNA OBERG, et al

Claimant - Appellant

v.

THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; THE OFFICIAL UNSECURED CREDITORS COMMITTEE OF A. H. ROBINS COMPANY, INCORPORATED; STANLEY K. JOYNES, III, Legal Representative of the Future Tort Claimants of A. H. Robins Company, Incorporated;

Parties-in-interest

A. H. ROBINS COMPANY, INCORPORATED

Debtor—Appellee

No. 88-1756

In Re: A. H. ROBINS COMPANY, INCORPORATED

Debtor

ALBERT L. SIVLEY

Claimant—Appellant

v.

THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; THE OFFICIAL UNSECURED CREDITORS COMMITTEE OF A. H. ROBINS COMPANY, INCORPORATED; RALPH R. MABEY; STANLEY K. JOYNES, III, Legal Representative of the Future Tort Claimants of A. H. Robins Company, Incorporated;

Parties-in-interest

A. H. ROBINS COMPANY, INCORPORATED

Debtor—Appellee

No. 88-1758

In Re: A. H. ROBINS COMPANY, INCORPORATED

Debtor

DIANA BROSCO; CATHERINE CRAWFORD; MARY FISCHER, et al

Claimants—Appellants

v.

THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; THE OFFICIAL UNSECURED CREDITORS COMMITTEE OF A. H. ROBINS COMPANY, INCORPORATED; RALPH R. MABEY; STANLEY K. JOYNES, III, Legal Representative of the Future Tort Claimants of A. H. Robins Company, Incorporated;

Parties-in-interest

A. H. ROBINS COMPANY, INCORPORATED

Debtor—Appellee

No. 88-1759

In Re: A. H. ROBINS COMPANY, INCORPORATED

Debtor

LYNN SCOTT; CAROL LOPEZ, et al

Claimants—Appellants

v.

THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; THE OFFICIAL UNSECURED CREDITORS COMMITTEE OF A. H. ROBINS COMPANY, INCORPORATED; RALPH R. MABEY; STANLEY K. JOYNES, III, Legal Representative of the Future Tort Claimants of A. H. Robins Company, Incorporated;

Parties-in-interest

A. H. ROBINS COMPANY, INCORPORATED

Debtor—Appellee

No. 88-1760

In Re: A. H. ROBINS COMPANY, INCORPORATED

Debtor

ELAINE CUMLEY; LAURA JONES; JEAN ABAD, et al

Claimants—Appellants

v.

THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; THE OFFICIAL UNSECURED CREDITORS COMMITTEE OF A. H. ROBINS COMPANY, INCORPORATED; RALPH R. MABEY; STANLEY K. JOYNES, III, Legal Representative of the Future Tort Claimants of A. H. Robins Company, Incorporated;

Parties-in-interest

A. H. ROBINS COMPANY, INCORPORATED

Debtor—Appellee

No. 88-1763

In Re: A. H. ROBINS COMPANY, INCORPORATED

Debtor

ALEXIA ANDERSON, et al

Claimant—Appellant

v.

STANLEY K. JOYNES, III, Legal Representative of the Future Tort Claimants of A. H. Robins Company, Incorporated; THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; THE OFFICIAL UNSECURED CREDITORS COMMITTEE OF A. H. ROBINS COMPANY, INCORPORATED; RALPH R. MABEY;

Parties-in-interest

A. H. ROBINS COMPANY, INCORPORATED

Debtor—Appellee

No. 88-3602

In Re: A. H. ROBINS COMPANY, INCORPORATED

Debtor

ALEXIA ANDERSON, et al

Claimant—Appellant

v.

THE OFFICIAL UNSECURED CREDITORS COMMITTEE OF A. H. ROBINS COMPANY, INCORPORATED; THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; RALPH R. MABEY; STANLEY K. JOYNES, III, Legal Representative of the Future Tort Claimants of A. H. Robins Company, Incorporated;

Parties-in-interest

A. H. ROBINS COMPANY, INCORPORATED

Debtor -Appellee

APPEALS FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ John M. Graecen
CLERK

Supreme Court, U.S.
FILED
OCT 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-441

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROSEMARY MENARD-SANFORD, *et al.*,

Petitioners,

—v.—

A. H. ROBINS COMPANY, INCORPORATED, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION BY RESPONDENT RALPH R. MABEY, EXAMINER OF A. H. ROBINS COMPANY, INCORPORATED

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(801) 355-6900

QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit properly held that 11 U.S.C. § 105(a) authorized and 11 U.S.C. § 524(e) did not prohibit the injunction of claims against non-debtor third parties in conjunction with a Chapter 11 plan of reorganization providing for full payment of such claims where the funds to be used to pay such claims would not be available without the plan's injunction provisions?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-441

ROSEMARY MENARD-SANFORD, *et al.*,

Petitioners,

—v.—

A. H. ROBINS COMPANY, INCORPORATED, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION BY RESPONDENT RALPH R. MABEY, EXAMINER OF A. H. ROBINS COMPANY, INCORPORATED

Respondent Ralph R. Mabey, Examiner of A. H. Robins Company, Incorporated ("A. H. Robins"), appointed by the District Court pursuant to 11 U.S.C. § 1104(b), respectfully requests that this Court deny the petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit in this case. The opinion is reported at 880 F.2d 694.

STATUTES INVOLVED

The statutes involved are Sections 105(a), 524(e), and 1123(b)(5) of the Bankruptcy Code.

Section 105(a) provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of

this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Section 524(e) provides:

Except as provided in subsection (a)(3)[1] of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

Section 1123(b)(5) provides:

Subject to subsection (a) of this section,[2] a plan may— . . . (5) include any other appropriate provision not inconsistent with the applicable provisions of this title.

REASONS FOR DENYING THE PETITION

If the petition is granted, compensation to injured persons will be delayed and the existence of the payment fund to be created for them under the plan will be jeopardized. This case does not present any "special and important reasons" which warrant granting certiorari. S. Ct. R. 17.1. It involves no conflict with decisions of this Court, no constitutional issues, no conflict among the Courts of Appeals, and no question whose resolution would significantly affect the administration of the bankruptcy laws.

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1 Subsection (a)(3) addresses community claims concerning an individual debtor and that debtor's spouse.

2 Subsection (a) does not address injunctions against third parties.

A. Granting the petition will delay compensation to injured persons and jeopardize the payment fund set aside for them.

As part of the duties assigned to him by the District Court, the Examiner assisted in the development and negotiation of the plan of reorganization (71a). The plan embodies compromises from the positions of all constituents which resulted in support by the major negotiating representatives: the Dalkon Shield Claimants Committee, the Official Unsecured Creditors Committee, the Official Committee of Equity Security Holders, and the debtor, A. H. Robins.[3] The plan was accepted by 131,761 Dalkon Shield Claimants who comprise 94.38% of all Dalkon Shield Claimants who voted on the plan (9a-10a, 71a). It has been and remains the Examiner's view that this plan is an appropriate resolution of this bankruptcy case and should be preserved intact notwithstanding the petitioners' objections.

The petition challenges only one element of the plan, the injunction (Petition at 3).[4] Petitioners seem willing to take

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3 Disclosure statement at 1, 14. In letters sent with the disclosure statement, the Dalkon Shield Claimants Committee, the Official Unsecured Creditors Committee, and the Official Committee of Equity Security Holders recommended acceptance of the plan. Joint Appendix in the Court of Appeals at 362-366, 372-375. At the hearing on confirmation of the plan, the Examiner and counsel for the Dalkon Shield Claimants Committee, the Official Unsecured Creditors Committee, and the Official Committee of Equity Security Holders supported confirmation of the plan. Joint Appendix in the Court of Appeals at 207, 214-215, 222, 223-224. The Legal Representative of the Future Tort Claimants initially objected to the plan but later stated that he did not oppose the plan.

4 Petitioners argue that the funds set aside under the Plan to pay Dalkon Shield claims "may be inadequate" and argue that as a consequence "the entire risk of inadequate funding has been transferred from Robins' shareholders to Dalkon Shield victims" (Petition at 2). But petitioners do not challenge the District Court's finding of fact, sustained by the Court of Appeals, that "[t]he payments into the Trusts provided for under Sections 5.01(b), 5.02(b) and 6.07 of the

advantage of the payments provided under the plan without respect for the injunction that makes those payments possible by preventing indemnity claims by third parties against the funds and by preserving the peace with respect to Dalkon Shield litigation, which peace is so important to the reorganized company whose major business is the sale of consumer products. But the implications of the petition are much broader than the petition suggests. The injunction cannot be considered in isolation.

In the circumstances of this case, the Court cannot consider the plan's injunction without jeopardizing the entire plan. The plan's elements were presented, voted upon, accepted, and confirmed as an integrated, non-severable, and mutually-dependent whole, arduously achieved by negotiation and compromise with all parties in interest represented. By its terms, and as a matter of economics, the plan stands or falls as a whole (17a-19a, 43a ¶ 14, 50a ¶ 35, 73a, 74a, 80a-81a, 82a).

Furthermore, $2.255 billion, which is most of the total funding for Dalkon Shield Claimants under the plan, results from the acquisition (through a subsidiary merger) of A. H. Robins by American Home Products Corporation. Of that amount, $2.155 billion[5] is not available to pay Dalkon Shield Claimants until the plan has been consummated and may never be available if the order confirming the plan does not become final by

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Plan are sufficient to pay all Allowed Dalkon Shield Personal Injury Claims, Allowed Dalkon Shield Liquidated Claims and costs and expenses of the Trusts in full" (42a-43a). Thus, petitioners' arguments concerning risk of inadequate funding and the shifting of that risk are not properly before this Court.

5 $100 million used for trust administrative expenses, trust work preparatory to making distributions, and payments to Dalkon Shield Claimants holding liquidated claims or accepting an expedited settlement has already been paid. As of September 21, 1989, 81,526 claimants have accepted an expedited settlement and have been paid a total of $53,074,600 out of these funds. In addition, previously liquidated Dalkon Shield Claims have been paid by the trust in the amount of $1,628,874.56.

December 31, 1989.[6] Indeed, should this Court grant the petition thereby delaying the entry of a final order past this deadline, and should American Home Products Corporation thereby fail to acquire A. H. Robins, then the plan of reorganization would fail, its injunction would never become effective and the issue to be decided by the Court would become moot.

The most important objective of the bankruptcy case of A. H. Robins has been to secure an equitable means of compensating persons injured by the Dalkon Shield. The bankruptcy case began over four years ago on August 21, 1985. In April of 1987, the Examiner, the Official Dalkon Shield Claimants Committee, and A. H. Robins proposed an emergency fund for medical treatment on an expedited basis to injured women whose infertility caused by the Dalkon Shield was potentially reversible through surgery or *in vitro* fertilization. In *Official Committee of Equity Security Holders v. Mabey (In re A. H. Robins Co.)*, 832 F.2d 299 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 1228 (1988), the District Court's order approving that proposal for funding emergency medical treatment was reversed. The Court of Appeals said payment to injured women must await a plan of reorganization. Now, when that plan is ready to be consummated, granting the present petition will further delay the compensation of injured victims of the Dalkon Shield.

B. The Court of Appeals' decision is not in conflict with any decision of this Court and presents no constitutional question.

Petitioners have not cited any decision of this Court with which the Court of Appeals' decision is in conflict. This Court has not interpreted Sections 524(e) or 1123(b)(5) and only once

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6 The merger agreement provides that it may be terminated by American Home Products Corporation if the plan confirmation order has not become a final order prior to the first anniversary of the entry of the confirmation order (July 26, 1989). Disclosure statement at 33; merger agreement § 8.1(iii). Under an agreement entered into after the completion of the record in the Court of Appeals, the July 26, 1989, date was extended to December 31, 1989.

has addressed Section 105.[7] This case involves interpreting the injunctive powers available under Sections 105(a) and 1123(b)(5) in light of Section 524(e); it does not involve any issues of constitutional law.[8]

C. There is no conflict among the Courts of Appeals on the issues of statutory interpretation presented in this case.

This case does not present an opportunity to resolve a conflict among the Courts of Appeals. It is true that in discussing whether Section 524(e) prohibits the discharge of non-debtors under a reorganization plan the Court of Appeals in this case discussed holdings in *Underhill v. Royal*, 769 F.2d 1426 (9th Cir. 1985) and *Union Carbide Corp. v. Newboles*, 686 F.2d 593 (7th Cir. 1982) as well as *dicta* in *Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987).[9] Nevertheless, no Court of Appeals has held that an injunction such as the injunction in this case is impermissible where it is an essential part of a reorganization plan providing for full payment of the claims to be enjoined.

Union Carbide construed Section 16 of the former Bankruptcy Act, 11 U.S.C. § 34 (repealed 1978) which provided that:

> [t]he liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt *shall not* be altered by the discharge of such bankrupt (emphasis supplied).

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7 *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

8 Although petitioners append a tenuous due process argument to their list of "factors support[ing] review" of the injunction provisions (Petition at 13), that argument was not presented to the Court of Appeals and is not properly before this Court. Moreover, petitioners do not (and cannot) contend that they have not had notice or an opportunity to be heard concerning the injunction provisions.

9 *Republic Supply* did not reach the question of the power of a bankruptcy court to confirm a plan providing for the cancellation of a non-debtor's guaranty of a debt provided for in the plan.

By contrast, Section 524(e) provides that:

> discharge of a debt of the debtor *does not* affect the liability of any other entity on, or the property of any other entity for, such debt (emphasis supplied).

Section 16 may have been prohibitive while Section 524(e) is merely explanatory.[10] Moreover, *Union Carbide* addressed a plan of reorganization under which only 20% of the claims in question would be paid. The plan in this case provides for payment of 100% of the claims subject to its injunction provisions (42a-43a).

Underhill did not address the injunctive powers of bankruptcy courts under Section 105(a) or its predecessor or under Section 1123(b)(5). *Underhill* involved a reorganization plan which paid only 50% of the claims it sought to release. Furthermore, the plan's injunction provisions in the case before the Court were found to be essential elements and prerequisites to the availability of the funds to be used to pay Dalkon Shield Claims (17a-18a, 19a, 43a ¶ 14, 50a ¶ 35, 73a, 74a, 80a-81a). In *Underhill* no similar findings of fact were made.

United States v. Huckabee Auto Co., 783 F.2d 1546 (11th Cir. 1986) does not demonstrate a conflict among the Courts of Appeals on the question presented in this case. Although *Huckabee* said bankruptcy courts could not enjoin the IRS from collecting taxes from third parties the Court of Appeals did not construe or even cite Section 524(e). Moreover, although the Court of Appeals did not reach them, *Huckabee* presented questions of the power of a bankruptcy court to enjoin the IRS from collecting taxes from third parties in the teeth of an express federal statute prohibiting such injunctions and a claim

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10 The *dicta* in *Republic Supply v. Shoaf*, *supra*, cited by the Court of Appeals (18a) recognizes that Section 524(e) is not prohibitive. An earlier opinion of the same court, cited by petitioners, noted the explanatory function of Section 524(e) which delineates the ordinary effect of a bankruptcy discharge. *United States v. Stribling Flying Service Inc.*, 734 F.2d 221, 223 (5th Cir. 1984) (plan did not purport to affect third-party debt). Thus, rather than representing an intra-circuit conflict, as petitioners seem to suggest, these two opinions illustrate a consistent interpretation of Section 524(e).

of sovereign immunity. *See Huckabee*, 783 F.2d at 1548 n. 3; 26 U.S.C. § 7421. No statutory conflicts or claims of immunity are present in this case.

In an opinion decided the day after the filing of the petition in this case, the United States Court of Appeals for the Ninth Circuit declined to overturn a bankruptcy court's temporary injunction of the prosecution of claims against third-party guarantors of a debtor's obligation. Although the guarantors argued that the injunction should have been made permanent and cited the Court of Appeals' decision in this case as precedent, the court found that a permanent injunction was not appropriate under the facts before it. The court rightly recognized that the holding in this case now before this Court is expressly limited to its unusual facts and, on that ground, determined that its opinion is not in conflict. *American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.)*, No. 87-4438, 1989 U.S. App. LEXIS 13822 (9th Cir. September 15, 1989).

Finally, the Court of Appeals' decision is not in conflict with the only other decision of a Court of Appeals which has addressed the injunctive powers of bankruptcy courts under Section 105(a) in circumstances analogous to those in this case. *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89 (2d Cir.), *cert. denied*, 109 S. Ct. 176 (1988).

D. The question presented does not significantly affect the administration of the bankruptcy laws.

The fact-specific circumstances of this case demonstrate the limited applicability of the Court of Appeals' ruling and of any decision on the merits which this Court might render. The Court of Appeals emphasized that its holding was narrow:

> In this situation where the Plan was overwhelmingly approved, where the Plan in conjunction with insurance policies provided as a part of a plan of reorganization gives a second chance for even late claimants to recover where, nevertheless, some have chosen not to take part in

> the settlement in order to retain rights to sue certain other parties, and where the entire reorganization hinges on the debtor being free from indirect claims such as suits against parties who would have indemnity or contribution claims against the debtor, we do not construe § 524(e) so that it limits the equitable power of the bankruptcy court to enjoin the questioned suits. We leave questions concerning cases in which § 524(e) does apply for another day.

(19a). This holding, based on the particular facts of this case, will not significantly affect the administration of the bankruptcy laws. *See American Hardwoods, supra* (finding that the holding in this case is limited to its unusual facts).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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No. 89-441

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROSEMARY MENARD-SANFORD, *et al.*,

Petitioners.

v.

A. H. ROBINS COMPANY, INCORPORATED, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Should the order of a district court confirming a consensual reorganization plan containing a $2.3 billion trust fund for the benefit of personal injury claimants be reversed solely because the plan includes a provision enjoining creditors with personal injury claims from pursuing those claims against third parties, who are allegedly joint tortfeasors with the debtor, where: (i) the purpose of such injunction is to channel all such claims to a trust for payment; (ii) the district court has determined that the cash to be paid into that trust is sufficient to pay all such claims in full; and (iii) the funds to be used to pay such claims would not be available without the injunction?

RULE 28.1 STATEMENT

As required by Rule 28.1 of the Rules of the United States Supreme Court, A. H. Robins Company, Incorporated states that its subsidiaries and affiliates, not wholly-owned, are: Lee Laboratories, Incorporated, Trimark Corporation, Eurand International, S.p.A., Eurand Microencapsulation, S.A., Eurand de Mexico, S.A. de C.V., Phariab Industrial Company, A. H. Robins Farmaceutica, S.A., Pharco Laboratories, Ltd., Eurand France, S.A., Eurand Espanola, S.A., and Diffucap Eurand, S.A. A. H. Robins Company, Incorporated has no parent company. As part of its confirmed plan of reorganization, A. H. Robins Company, Incorporated has signed a merger agreement with American Home Products Corporation and AHP Subsidiary (9) Corporation that has not been consummated as of this date.

American Home Products Corporation states that its subsidiaries and affiliates, not wholly-owned, are: CIE Realty Company, Inc., Geoffrey Manners & Co., John Wyeth (India) Limited, Wyeth Egypt S.A.E., Wyeth Nigeria Limited, Wyeth Laboratories Limited, Wyeth Laboratories (Bangladesh) Limited, Wyeth Laboratories (Pakistan) Limited, Wyeth-Suaco Laboratories Inc., 2236 Realty Co. Inc., Wyeth Laboratories Corporation, Nippon Sherwood Medical Industries Ltd., Wyeth (Taiwan) Ltd., and Wyeth-Ayerst Pharmaceuticals, Inc. American Home Products Corporation has no parent company.

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STATUTES INVOLVED

The statutues involved are 11 U.S.C. § 105(a) and 11 U.S.C. § 524(e). 11 U.S.C. § 524(e) is reproduced in the Petition. Pet. at 2. 11 U.S.C. § 105(a) provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

No. 89-441

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROSEMARY MENARD-SANFORD, *et al.*,

Petitioners,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

Respondent A. H. Robins Company, Incorporated ("A. H. Robins"), opposes the petition of various Dalkon Shield claimants ("Petitioners") for a writ of certiorari (the "Petition"). As discussed below, the Petitioners seek further review of matters which do not meet the suggested standards for review set forth in Supreme Court Rule 17.1 and were correctly decided below.

I.

COUNTERSTATEMENT OF THE CASE

As the courts below recognized, the injunction that Petitioners challenge must be evaluated in light of the myriad of unique facts in this case. By largely ignoring those facts, Petitioners' Statement of the Case fails to provide this Court with an adequate basis for evaluating the single issue on which they seek review. The most glaring omission in the Petitioners' factual recitation is the district court's finding that A. H. Robins' plan of reorganization (the "Plan") will provide payment in full to Dalkon Shield claimants.[1] Despite Petitioners' efforts to articulate a legal issue appropriate for review by this Court, Petitioners' Statement of the Case demonstrates that the key to their challenge to the Plan is their disagreement with that factual finding. Indeed, Petitioners recognize the significance of that finding when they admit that full payment of Dalkon Shield claims "might justify this Court in declining to hear [this] case . . . ." Pet. at 10.

A. *Background Facts*

In 1970, A. H. Robins acquired the rights to the Dalkon Shield, which it distributed internationally from 1970 to 1975. By mid-1985, there were almost 6,000 lawsuits and claims arising from the Dalkon Shield pending against A. H. Robins and, in many cases, against others with indemnification and/or contribution rights against A. H. Robins. Faced with the financial drain caused by soaring litigation costs and the inability to defend hundreds of suits at the same time, on August 21, 1985, A. H. Robins filed for reorganization relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code").

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[1] Both here and in the Petition, "Dalkon Shield claims" refers to personal injury claims asserted by users of the Dalkon Shield or by those with a personal relationship (*e.g.*, husband, child) to a Dalkon Shield user.

After several years of litigation and negotiation, and following a multi-million dollar, eighteen-month analysis of Dalkon Shield claims, A. H. Robins and the numerous parties in interest[2] in this case finally succeeded in negotiating a comprehensive and consensual plan of reorganization resolving this mass tort litigation. The Plan, which is dependent upon the acquisition of A. H. Robins by American Home Products Corporation ("AHP"),[3] was overwhelmingly approved by all classes of creditors, including 94% of the approximately 140,000 Dalkon Shield claimants who voted on it (71a).

In its order confirming the Plan, the district court recognized that the Plan reflects a complex set of compromises and settlements, of which the injunction is an integral and essential part (74a). It also made a factual determination that the payments being made by A. H. Robins and AHP under the Plan are sufficient to pay Dalkon Shield claimants in full (42a-43a) (the "Sufficiency Finding"), thus satisfying a key condition to consummation of the Plan.

1. *Estimation Of Dalkon Shield Claims*

Virtually all of the 195,000 Dalkon Shield claims filed in A. H. Robins' Chapter 11 case are unliquidated and disputed. In order to formulate and confirm a workable plan of reorganization, it was necessary to determine the aggregate value

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[2] Throughout this case the district court afforded to all interested parties the opportunity to participate and to be heard. To ensure adequate and competent representation of the various constituencies, including Dalkon Shield claimants, several official committees were constituted pursuant to section 1102 of the Bankruptcy Code: the Dalkon Shield Claimants' Committee, the Legal Representative of the Future [Dalkon Shield] Tort Claimants, the Equity Security Holders' Committee and the Unsecured Creditors' Committee, all of which forcefully advocated the interests of their constituents and participated in the formulation of the Plan.

[3] AHP has the absolute right to abandon the proposed acquisition, which has already been pending for 18 months, if all appellate review of the Plan has not been completed by December 31, 1989. Absent the acquisition, the Plan cannot be consummated.

of those claims.[4] Accordingly, the district court appointed Professor Francis E. McGovern as its expert to develop, in cooperation with the Dalkon Shield Claimants' Committee, the Unsecured Creditors' Committee, the Legal Representative of Future Tort Claimants, the Equity Security Holders' Committee (collectively the "Official Committees"), A. H. Robins and A. H. Robins' insurer, The Aetna Casualty and Surety Company ("Aetna"), a reliable data base to aid in analyzing and determining the aggregate value of the Dalkon Shield claims (62a). All of the interested parties and Professor McGovern retained experts to assist them in the collection, evaluation and analysis of data regarding Dalkon Shield claims (62a-63a).

This multi-million dollar claims analysis process took more than a year and a half to complete. It involved an in-depth analysis of detailed information concerning the claims of approximately 6,000 claimants who were scientifically selected as being representative of all claimants. The selected claimants responded to a detailed questionnaire and request for medical records. The process eventually resulted in the compilation of an extensive data base which was made available to all interested parties (63a).

Beginning on November 5, 1987, after months of preparation and discovery, the district court held six days of hearings,[5] at which it heard medical, statistical, epidemiological, and other expert testimony. Numerous briefs, memoranda and expert

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[4] Section 502(c) of the Bankruptcy Code provides that: "[t]here *shall* be estimated for purpose of allowance under this section . . . any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case . . . ." (emphasis added); *see also A. H. Robins Co. v. Piccinin*, 788 F.2d 994, 1012 (4th Cir.) (estimation "is a mandatory obligation of the . . . court"), *cert. denied*, 479 U.S. 876 (1986).

[5] Petitioners were afforded the opportunity to participate in the hearings through counsel for the Dalkon Shield Claimants' Committee. Throughout the hearings, counsel for the Claimants' Committee consulted with counsel representing individual claimants or groups of claimants. Estimation Hearing Transcript at 8.

reports were submitted to the district court (63a). Through their witnesses, the parties in interest presented their estimates of the aggregate value of Dalkon Shield claims and introduced more than three hundred exhibits on the issue.

In weighing the evidence, the district court stated in no uncertain terms that it would resolve any and all doubts in favor of overestimating the value of the Dalkon Shield claims,[6] and that its estimate would be the highest amount consistent with credible evidence.[7] On December 11, 1987, the district court announced that the total amount of money necessary to pay all Dalkon Shield claims and related administrative expenses of the trust that would be established to evaluate and pay those claims (the "Claimants Trust") was $2.475 billion, payable over a reasonable period of time (the "Estimate").

2. *The Plan*

Following announcement of the Estimate, several prospective acquirors submitted proposals for the acquisition and reorganization of A. H. Robins. On January 19, 1988, A. H. Robins' board of directors accepted AHP's proposal, which subsequently was incorporated into, and provides the bulk of the funding for, the Plan. AHP's proposal, unlike any of the others, had the support of the Official Committees representing, among others, Dalkon Shield claimants, and of the court-appointed examiner in this case. It offered the highest and quickest payout to the claimants (65a) and a fund in excess of the Estimate (66a).

As highlighted by the district court (65a), AHP's proposal was premised on (i) payment of Dalkon Shield claims in full and (ii) freeing AHP, A. H. Robins, and their affiliates and respective personnel from any direct or indirect liabilities for, or

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[6] Estimation Hearing Transcript at 2434.

[7] The district court specifically stated: "[M]y ultimate estimation was higher than everyone, except the expert by the claimants' committee, and I have expressed from the bench, I have no confidence in him. His credibility was negligible." October 24, 1988 Hearing Transcript at 12.

involvement in litigation or claims regarding, the Dalkon Shield.[8] Thus, like every other potential acquiror of A. H. Robins, AHP conditioned consummation of its acquisition on entry of an injunction that would protect its investment, end Dalkon Shield litigation and ensure "global peace." Indeed, at the hearing on confirmation of the Plan, held in July of 1988, AHP's Chief Financial Officer testified that it was vital to AHP, as the prospective acquiror of A. H. Robins, that it be protected not only from the assertion of claims, direct and indirect, related to the Dalkon Shield, but also from *any* involvement in the expensive and acrimonious litigation regarding the Dalkon Shield.[9] Consistent with this position, sections 7.02(a)(vii), (ix) and (xv) of the Plan made it a condition to consummation of the Plan that the order confirming the Plan (i) contain the injunctive provisions set forth in the Plan, (ii) reflect that those provisions "are an integral part of the compromises and settlements incorporated in the Plan," and (iii) provide that "the provisions of the Confirmation Order shall be nonseverable and mutually dependent."

The cornerstone of the Plan is the non-reversionary payment by AHP and A. H. Robins of $2.3 billion in cash upon consummation of the Plan (not over time), a sum which the district court found exceeded the Estimate (66a).[10] The Plan also establishes a single claims resolution facility for the efficient, economical and uniform evaluation and payment of Dalkon Shield claims. The Plan's injunctive provisions channel Dalkon

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[8] The district court shared AHP's concern on this point, stating: "The Court deems AHP's concern in this regard to be well taken. An investment of the magnitude involved here requires all reasonable effort to, consistent with the law, end all Dalkon Shield litigation. . . ." (65a).

[9] *See* Confirmation Hearing Transcript at 158-160.

[10] $2.3 billion in cash, together with $50 million in insurance, is the *minimum* that will be made available for the payment of Dalkon Shield claims under the Plan. Of the $2.3 billion, $2.255 billion will be paid to the Claimants Trust on consummation. The remaining $45 million will eventually be paid from a second trust into the Claimants Trust if it is not used for the payment of indirect Dalkon Shield-related claims, such as claims based upon indemnification and contribution. *See* pages 12-13 of the disclosure statement relating to the Plan, annexed hereto as Appendix of Respondent.

Shield claims to the Claimants Trust for evaluation and payment, thus ensuring equality of treatment among the claimants and terminating piecemeal litigation over the Dalkon Shield (74a).

The Plan was overwhelmingly accepted by all classes of creditors and equity security holders, with over 94% of the Dalkon Shield claimants who voted on the Plan voting to accept it. It subsequently was confirmed by the district court following an evidentiary hearing on the Plan, and all objections to the Plan, including those of Petitioners, were overruled (45a).

Following confirmation, A. H. Robins fulfilled its obligation under section 6.07 of the Plan to pay $100 million to the Claimants Trust in order to (i) fund administrative and start-up costs of the Claimants Trust and (ii) pay claimants who elected to settle their claims under an abbreviated claims evaluation procedure provided for in the Plan. By mid-September 1989, the Claimants Trust had made significant progress in dealing with Dalkon Shield claims, and more than 80,000 Dalkon Shield claimants had settled their claims in exchange for payments from the Claimants Trust ranging from $125 to $725.[11] Thus, over 40% of the Dalkon Shield claims already have been satisfied using less than 3% of the minimum amount that will be paid to the Claimants Trust if the Plan is consummated.

B. *Decisions Below*

1. *District Court*

On July 25, 1988, the district court issued the order confirming the Plan (the "Confirmation Order") and a memorandum opinion in support thereof. The opinion and Confirmation Order explained the complex process by which the aggregate value of Dalkon Shield claims was ascertained (62a-64a), and found that the payments to be made by A. H. Robins and AHP[12] are in and

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[11] The Claimants Trust's payments to Dalkon Shield claimants occurred after the completion of the record below, and, therefore, are not reflected in that record.

[12] Additional funds may be available from Aetna pursuant to the settlement of a class action referred to in the Fourth Circuit's opinion as the "Breland"

(*Footnote continued*)

of themselves sufficient to pay in full all valid Dalkon Shield claims and administrative costs and expenses of resolving those claims (42a-43a, 73a).

The opinion also contains a discussion of the Plan's injunctive provisions, including a finding (80a-81a) that given the circumstances of this case, the district court had the power, under section 105 of the Bankruptcy Code, to approve the Plan's injunctive provisions. The district court found that such provisions were necessary to ensure a successful implementation of the Plan, and to ensure that AHP would receive the benefit of its bargain — *i.e.*, a reorganized A. H. Robins free from any liabilities, direct or indirect, or involvement in Dalkon Shield litigation. Moreover, the district court found that the injunctive provisions promoted equality of treatment of all Dalkon Shield claimants by channelling their claims to an independent claims resolution facility for evaluation and payment.[13] Finally, the

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class action (the "Breland Class Action" and "Breland Settlement") (15a). Those funds, however, are not necessary for the Sufficiency Finding; they provide a cushion over and above the Estimate.

The Breland Settlement is subject to a separate petition for writ of certiorari entitled *Alexia Anderson, et al. v. Aetna Casualty and Surety Company, et al.* However, if all appellate review of the Plan is completed by December 31, 1989, the Plan *must* be consummated, regardless of the status of the Breland Petition and Settlement. *See* Breland Class Action Pet. at 10, 14.

[13] The district court specifically found:

> "[T]his Court [has] jurisdiction to enjoin proceedings in other courts, enjoin parties from commencing or continuing litigation, and to otherwise approve the channelling [*i.e.*, injunctive] provisions in order to ensure: (i) the efficient administration of Robins' estate; (ii) the efficient administration of the [t]rusts; (iii) the systematic evaluation and payment of Dalkon Shield claims in an orderly, fair manner, applying the same rules to all; (iv) that the bulk of the funds in both [t]rusts are made available for the payment of Dalkon Shield personal injury claims pursuant to the same method of claims evaluation; (v) minimization of expenditures and transaction costs payable from the Other Claimants Trust, for protracted litigation of questionable value against third parties;
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> (*Footnote continued*)

district court found that the Plan's injunctive provisions are an integral part of a complex and interdependent web of compromises and settlements, without which this consensual Plan could not have been achieved (43a, 74a). *See also* Confirmation Order ¶ 35 (noting that "[t]he provisions of th[e] [Confirmation] Order are non-severable and mutually dependent") (50a).

2. *Court Of Appeals*

On June 16, 1989, the Fourth Circuit unanimously affirmed the Confirmation Order.[14] In doing so, the Fourth Circuit upheld the district court's Estimate and specifically rejected all of Petitioners' factual challenges to the Estimate (14a).

The Fourth Circuit also unanimously affirmed the district court's approval of the Plan's injunctive provisions, and rejected the Petitioners' argument that section 524(e) of the Bankruptcy Code is an absolute prohibition on the power of bankruptcy courts to enter such provisions. The Fourth Circuit specifically held that the circumstances of this novel and complex case justified the district court's use of its equitable power to approve the injunctive provisions in the context of the Plan. The Fourth Circuit echoed the district court's (and every potential acquiror's) concerns and concluded by holding that "where the entire reorganization hinges on the debtor being free from indirect

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> (vi) successful consummation of the Plan; (vii) that Dalkon Shield personal injury claimants do not bypass the Claims Resolution Facility, to the detriment of other Dalkon Shield personal injury claimants; (viii) equality of distribution to Dalkon Shield personal injury claimants; and (ix) rehabilitation and reorganization of Robins, free from direct and indirect involvement in further Dalkon Shield litigation."

(78a-79a); *see also* (79a-81a).

[14] A complete review of the Fourth Circuit's decision is not necessary in light of Petitioners' decision to abandon most of their prior challenges to the Plan. *See* Pet. at 2-3 ("[P]etitioners . . . at this point . . . object only to one element of the [P]lan . . . .").

claims such as suits against parties who would have indemnification or contribution claims against the debtor, we do not construe 524(e) so that it limits the equitable power of the bankruptcy court to enjoin the questioned suits." (19a).

II.

SUMMARY OF THE ARGUMENT

The Petition should be denied. The Petitioners' opposition to the injunctive provisions of the confirmed Plan is premised upon their disagreement with the Estimate and subsequent Sufficiency Finding, neither of which is suitable for review by this Court. The decision of the Fourth Circuit upholding the injunction created no conflict among the courts of appeals and correctly applied the relevant provisions of the Bankruptcy Code.

III.

REASONS FOR DENYING THE WRIT

A. *The Petition Is Premised On A Challenge To A Factual Finding That Is Not Suitable For Review By This Court*

Petitioners' challenge to the Plan is based on the false premise that there is a "substantial likelihood" that Petitioners will not be fully compensated for their injuries under the Plan.[15] Indeed, the Petitioners assert no fewer than three times in their Petition that there is a "substantial" risk they will not be fully compensated for their injuries.[16] The district court's finding of payment

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[15] Indeed, Petitioners' Question Presented expressly incorporates the assumption that "the fund created in the reorganization may not be sufficient to pay all creditors in full. . . ." Moreover, Petitioners concede that if the premise that "all the claimants would be paid in full. . .were correct, it might justify this Court in declining to hear the case . . . ." Pet. at 10.

[16] Thus, Petitioners state, with absolutely no support from the record, that "everyone recognized that there was a substantial risk that the fund might

(*Footnote continued*)

in full, however, is amply supported by the record, is not the subject of the Petition, and is not, in any event, suitable for review because of its fact-specific nature.

Far from supporting the assertion that there is a "substantial likelihood" that the Dalkon Shield claimants will not be fully compensated for their injuries, the record below in fact establishes that such claimants, including Petitioners, will be paid in full. Thus, following extensive evidentiary hearings at which the district court unequivocally stated that any error in the Estimate would be "on the up side," the district court specifically found that the money to be paid by A. H. Robins and AHP under the Plan would be enough to pay in full all Dalkon Shield claims (42a-43a, 64a, 66a).[17] Moreover, the Fourth Circuit upheld the district court's Estimate notwithstanding the Petitioners' challenges to that finding (14a). Now, rather than forthrightly challenge this finding of fact, Petitioners have chosen not only to ignore the finding, but even worse, to mischaracterize the record below.

Any challenge to the Sufficiency Finding, whether direct or indirect, must fail in light of the well-settled rule that findings of fact will not be overturned unless they are clearly erroneous, and the repeated admonition that:

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not be sufficient to pay all the claimants in full." Pet. at 5. Petitioners also erroneously assert that the Plan and disclosure statement support the proposition that there is a "substantial likelihood" of less than payment in full. Pet. at 10-11; *see also* Pet. at 11. In fact, the disclosure statement, which was mailed to claimants in April of 1988, points out that the Estimate may be proved to be "more or less" than the value of the claims, and it points out the benefits and consequences of each. Its primary thrust, however, is that the Plan would not go into effect unless the district court found that the Plan would pay Dalkon Shield claims in full. Subsequently, in July of 1988, the district court made that finding.

[17] The district court found that "[t]he compensation available for Dalkon Shield claims pursuant to the Plan and the merger. . . *exceeds* the Estimate as well as the liquidation value of the Debtor." (emphasis added) (66a).

> [a] court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949). The court below found that the Dalkon Shield claimants will be paid in full under the Plan.

B. *There Is No Conflict Among The Circuits*

Contrary to Petitioners' assertions, Pet. at 10-13, there is no conflict among the circuits regarding the operation of section 524(e) of the Bankruptcy Code.

Petitioners cite three cases in support of their purported conflict: *United States v. Huckabee Auto Co.*, 783 F.2d 1546 (11th Cir. 1986), *Union Carbide Corp. v. Newboles*, 686 F.2d 593 (7th Cir. 1982), and *Underhill v. Royal*, 769 F.2d 1426 (9th Cir. 1985).[18] Examination of these cases and other relevant authority, however, shows there is no conflict among the circuits on the meaning of section 524(e).

United States v. Huckabee Auto Co. does not reflect a conflict with the Fourth Circuit on the meaning of section 524(e) because it never once cites that section of the Bankruptcy Code. Rather, that case turns on an interpretation of the Internal

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[18] The Petitioners also suggest that *United States v. Stribling Flying Service, Inc.*, 734 F.2d 221 (5th Cir. 1984), may be relevant. Pet. at 11. *Stribling Flying Service* merely held that the confirmation of a reorganization plan, by itself, does not release guarantors of debts dealt with in the plan. In *Stribling Flying Service*, unlike here, there was no provision in the plan enjoining suits against the guarantor. Consequently, the case had nothing to do with whether section 524(e) *prohibits* third-party injunctions in a reorganization plan and therefore does not conflict with this case. Moreover, while not necessary to its decision, the Fifth Circuit itself subsequently noted that "[Section 524(e)] does not . . . preclude the discharge of a guaranty when it has been accepted and confirmed as an integral part of a plan of reorganization." *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987).

Revenue Code and general issues of jurisdiction. 783 F.2d at 1548.

Union Carbide Corp. v. Newboles also does not reflect a difference between the circuits on the meaning of section 524(e). Indeed, it was not even decided under the current Bankruptcy Code. Rather, *Union Carbide*, decided under the Bankruptcy Act of 1898, 11 U.S.C. §§ 1 *et seq.* (repealed 1978), construed section 16 of the Bankruptcy Act, 11 U.S.C. § 34, which is worded differently from section 524(e). *See* section C.1., *infra*. The Seventh Circuit, in considering a reorganization plan that provided a 20% payment to creditors, held only that a creditor's acceptance of a reorganization plan did not in and of itself validate a third-party release under the Bankruptcy Act. *Id.* at 595. Thus, the Seventh Circuit has never considered (i) the significance of the differences between the wording of section 16 of the Bankruptcy Act and section 524(e) of the Bankruptcy Code, (ii) the interaction of Bankruptcy Code section 105, relied on by the Fourth Circuit below, *see infra* at C.2., and section 524(e), or (iii) the scope of section 524(e) in the context of a plan that provides full payment. This Court should not review an artificial conflict which Petitioners have attempted to manufacture between the Seventh and the Fourth Circuits.

Finally, the Petitioners rely on *Underhill v. Royal* for a purported conflict among the circuits. *Underhill* only construes section 524(e) to establish that consent of creditors alone is not enough to validate an injunction precluding suits against third parties. The Fourth Circuit's decision below does not conflict with *Underhill*, because the Fourth Circuit did not hold that acceptance of the plan by Dalkon Shield claimants was itself a sufficient basis for the injunctions. Moreover, *Underhill* is quite different from *Robins* because in *Underhill* the creditors were to receive only a fifty percent distribution and the reorganization plan was confirmed only after the parties stipulated that the release need not be approved as part of the plan. 769 F.2d at 1430. Thus, unlike here, the injunction in *Underhill* was not a prerequisite to or an integral part of plan confirmation, and no attempt was made to provide full payment to creditors.

Moreover, the Ninth Circuit's recent decision in *American Hardwoods, Inc. v. Deutsche Credit Corp.* (In re American Hardwoods, Inc.), No. 87-4438, 1989 U.S. App. LEXIS 13822 (9th Cir. Sept. 15, 1989), clarifies the Ninth Circuit's interpretation of section 524(e). There, the court applied the *Underhill* decision to affirm an order denying a permanent injunction (that was not part of a reorganization plan) to benefit guarantors of a Chapter 11 debtor's liability. In so doing, however, the court stressed that an application of the Fourth Circuit's decision in *Robins* "would not dictate a different result." *Id.* at 3, 1989 U.S. App. LEXIS at 7. The Ninth Circuit distinguished *Robins* from *Underhill* and *American Hardwoods* on the "unusual facts" of the *Robins* case, noting that the *Robins* injunction was "essential to the plan" and that A. H. Robins' entire reorganization " 'hinged' on it." *Id.* at 3, 1989 U.S. App. LEXIS at 7-8. Petitioners, then, are arguing that there is a conflict between the Fourth and Ninth Circuits when the Ninth Circuit itself has noted that the facts here are unique and that the decision below is not inconsistent with its most recent decision concerning 524(e).

In short, then, Petitioners seek certiorari based on a difference of interpretation of a statute among the circuits when the circuits supposedly reflecting the difference either have (i) not even interpreted the statute at issue (Eleventh Circuit); (ii) interpreted a now-repealed statute with different language that was part of a different statutory scheme (Seventh Circuit); or (iii) stressed that the *Robins* case presented an unusual factual situation and does not conflict with its most recent application of the statute (Ninth Circuit). Thus, there is no conflict among the circuits for this Court to resolve.

C. *Section 524(e) Was Correctly Applied Below*

1. *Section 524(e) Does Not Prohibit The Injunctions*

This Court should not grant the Petition because this case was correctly decided. Petitioners' argument that the Plan discharges third parties in violation of section 524(e) of the Bankruptcy Code misconstrues the Plan's injunction and section 524(e). In fact, section 524(e), explaining the scope of a discharge, does

not by its terms have anything to do with whether a Plan may enjoin suits against third parties. Thus, section 524(e) provides:

> Except as provided in subsection (a)(3) of this section [relating to spousal debts], discharge of a debt of a debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

By its plain language, section 524(e) merely clarifies the effect and extent of a discharge; it does not address what may or may not be in a plan of reorganization,[19] as the Fourth Circuit recognized below (19a). *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987) ("section 524(e)...does not by its specific words preclude the discharge of a guaranty when it has been accepted and confirmed as an integral part of a plan of reorganization") (dicta). As noted by this Court, "as long as the statutory scheme is coherent and consistent, there generally is no need to inquire beyond the plain language of the statute". *United States v. Ron Pair Enterprises*, ____ U.S. ____, 109 S. Ct. 1026, 1030 (1989) (construing Bankruptcy Code section 506(b)).

2. *Section 105(a) Empowered The District Court To Approve The Injunction*

Section 105(a) of the Bankruptcy Code supports the issuance of injunctions against third-party litigation in appropriate circumstances; that statutory provision gave the district court the power to approve the injunction here (78a). Indeed, section 105(a) of the Bankruptcy Code, which provides that "[t]he court

---

[19] Section 524(e) replaces section 16 of the former Bankruptcy Act, 11 U.S.C. § 34 (repealed 1978), which provided that "[t]he liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt *shall not* be altered by the discharge of such bankrupt." (Emphasis added). Section 16 was intended to clarify that by voting to accept a plan that results in a discharge of the debtor, a creditor does not inadvertently and automatically release a guarantor. *See* 1A Collier, *Bankruptcy* ¶ 16.02 at 1523-27 (14th rev. ed. 1978). Section 524(e) is less restrictive than section 16 in that it uses the words "does not" rather than the words "shall not."

may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," correctly was held by the Fourth Circuit here to empower the district court to enter the injunction (19a). *See generally Manville Corp. v. The Equity Security Holders Committee* (In re Johns-Manville Corp.), 801 F.2d 60, 64 (2d Cir. 1986) ("[I]n our view, if the bankruptcy court may ever use its equitable powers under section 105(a) to enjoin actions . . . it may exercise that power where there is a basis for concluding that rehabilitation, the very purpose for the bankruptcy proceedings, might be undone by the other action.").

In this case, the district court appropriately used section 105 to foster the goals of the Bankruptcy Code. Specifically, the district court invoked that section to: (i) ensure equality of treatment to Dalkon Shield claimants, by channelling all Dalkon Shield claims to a trust for systematic evaluation and payment; (ii) protect the estate from unnecessary transactional costs by preventing lawsuits against third parties who would, in turn, assert claims against A. H. Robins; and (iii) maximize the funds available to Dalkon Shield claimants by eliminating AHP's concerns over the specter of endless post-confirmation Dalkon Shield litigation. In short, the district court used section 105 to ensure a cessation of the long, tragic and painful hostilities over the Dalkon Shield and to ensure a fair and lasting peace.

3. *There Has Been No Denial Of Due Process*

Although they did not raise the issue before the Fourth Circuit, Petitioners next argue that enjoining them from suing third parties "who were not before the bankruptcy court" denied the Petitioners a property right without due process of law. Pet. at 13, 14.[20] The issue of whether Petitioners were afforded due

[20] The third parties to whom Petitioners refer or allude (*e.g.*, A. H. Robins' officers and directors, Aetna, and law firms who represented A. H. Robins or Aetna in connection with the Dalkon Shield litigation) filed proofs of claim against A. H. Robins for indemnification, contribution and other claims, and hence, like Petitioners, were before the district court.

process, however, does not hinge on whether the parties whom they now wish to pursue were "before the court." Rather, the issue is whether Petitioners themselves were sufficiently "before the court" to enable the court to enter an order that affects their rights. Here, Petitioners asserted claims, had an opportunity to participate at every stage of the case, and were represented throughout by able counsel. They have had their day in court. *See Martin v. Wilks*, ____ U.S. ____, 109 S. Ct. 2180 (1989).

In fact, every case Petitioners cite considers whether individuals may be bound by orders entered when they arguably were not before the court. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (determining due process rights of unnamed class plaintiffs); *Martin v. Wilks*, 109 S. Ct. at 2184 (consent decrees entered in prior case did not preclude parties in subsequent case, who were not parties to the prior action, from seeking relief from actions purportedly taken pursuant to the consent decrees; "[a] judgment . . . among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings"); *In re Real Estate Title & Settlement Services Antitrust Litig.*, 869 F.2d 760, 762 (3d Cir. 1989) (if class member has not been given opportunity to opt out in class action involving both important injunctive relief and damage claims, member must either have minimum contacts with forum or consent to jurisdiction in order to be enjoined by district court that entertained class action).

Here, where Petitioners are being afforded the benefits of a Plan that has been found to be sufficient to pay all Dalkon Shield claims in full, following extensive hearings at which Petitioners had ample opportunity to participate, they cannot complain that the Plan's injunction violates the due process clause.

IV.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari to the Court of Appeals for the Fourth Circuit should be denied.

Dated: New York, New York
October 2, 1989

Respectfuly submitted,

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APPENDIX

OVERALL SUMMARY

1. If settlement of the Breland Case is approved by the District Court and upheld on appeal, *at least* $2,585,000,000 will be available to pay claims and administrative expenses of the Trust. The cash will also earn interest, which could result in hundreds of millions more dollars being available to pay your claims and administrative expenses of the Trust.

Total: $2,585,000,000 before interest

(a. $2,255,000,000 cash from Debtor
(b. 5,000,000 cash from E. C. Robins and E. C. Robins, Jr.
(c. 250,000,000 insurance from Aetna (Primary Excess Policy)*
(d. 50,000,000 cash from Aetna
(e. 25,000,000 cash from Successor Corporation (from Aetna money)
(f. Unknown amount of unused insurance that Robins and its subsidiaries have for Dalkon Shield claims (believed to be approximately $45 million)

Additionally, if the money in the Other Claimants Trust and available under the Outlier Policies of insurance is not needed to pay other types of claims, another $150,000,000 could be available over time to pay your claims and administrative expenses of the Trust.

Total: $150,000,000 before interest

(a. $50,000,000 insurance from Aetna (Outlier Policy)*
(b. 50,000,000 insurance from Aetna (Outlier Policy)*
(c. 50,000,000 cash from Other Claimants Trust**

---

* Insurance proceeds cannot be used to make distributions in lieu of punitive damages.

** $5,000,000 of the $50,000,000 will be paid to the Other Claimants Trust by E. C. Robins and E. C. Robins, Jr., and $45,000,000 will be paid to the Other Claimants Trust by the Debtor.

MAXIMUM TOTAL (EXCLUDING INTEREST ON THE CASH PAYMENTS, WHICH WILL BE SUBSTANTIAL IN AMOUNT) POTENTIALLY AVAILABLE IF SETTLEMENT OF THE BRELAND CASE IS APPROVED: $2,735,000,000

MINIMUM AMOUNT (EXCLUDING INTEREST ON THE CASH PAYMENTS, WHICH WILL BE SUBSTANTIAL IN AMOUNT) WHICH WILL BE AVAILABLE IF SETTLEMENT OF THE BRELAND CASE IS APPROVED: $2,585,000,000

II. If settlement of the Breland Case is approved by the District Court but not upheld on appeal, *at least* $2,310,000,000 will still be available to pay claims and administrative expenses of the Trust. The cash will also earn a great deal of interest, which could result in hundreds of millions more dollars being available to pay your claims. Additionally, you could still have the right to try to obtain money from Aetna, either through the Breland Case or individually.

Total: $2,310,000,000 before interest

a. $2,255,000,000 cash from Debtor
b. 5,000,000 cash from E. C. Robins and E. C. Robins, Jr.
c. 50,000,000 insurance from Aetna (Primary Excess Policy)*
d. Unknown amount of unused insurance that Robins and its subsidiaries have for Dalkon Shield claims (believed to be approximately $45 million)

Additionally, if the money in the Other Claimants Trust and available under the Outlier Policy of insurance is not needed to pay other types of claims, another $100,000,000 (over and above what you may be able to get from Aetna) could be available over time to pay your claims and administrative expenses of the Trust.

---

* Insurance proceeds cannot be used to make distributions in lieu of punitive damages.

Total:
$100,000,000
before interest

(a. $50,000,000 insurance from Aetna (Outlier Policy)*
(b. 50,000,000 cash from Other Claimants Trust

MAXIMUM TOTAL (EXCLUDING INTEREST ON THE CASH PAYMENTS, WHICH WILL BE SUBSTANTIAL IN AMOUNT) POTENTIALLY AVAILABLE EVEN IF SETTLEMENT OF THE BRELAND CASE IS NOT APPROVED:

$2,410,000,000
plus any money you may be able to recover from Aetna

MINIMUM AMOUNT (EXCLUDING INTEREST ON THE CASH PAYMENTS, WHICH WILL BE SUBSTANTIAL IN AMOUNT) WHICH WILL BE AVAILABLE EVEN IF SETTLEMENT OF THE BRELAND CASE IS NOT APPROVED:

$2,310,000,000
plus any money you may be able to recover from Aetna

* Insurance proceeds cannot be used to make distributions in lieu of punitive damages.

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CLERK

(5)

No. 89-441

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROSEMARY MENARD-SANFORD, et al.,

Petitioners,

v.

A. H. ROBINS COMPANY, INCORPORATED, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Should the order of a district court confirming a consensual reorganization plan containing a $2.3 billion trust fund for the benefit of personal injury claimants be reversed solely because the plan includes a provision enjoining creditors with personal injury claims from pursuing those claims against third parties, who are allegedly joint tortfeasors with the debtor, where: (i) the purpose of such injunction is to channel all such claims to a trust for payment; (ii) the district court has determined that the cash to be paid into that trust is sufficient to pay all such claims in full; and (iii) the funds to be used to pay such claims would not be available without the injunction?

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STATUTES INVOLVED

No statutes are cited in this brief.

COUNTERSTATEMENT OF THE CASE

Respondent Official Unsecured Creditors Committee (the "Committee") of A. H. Robins Company, Incorporated adopts the Counterstatement of the Case in the brief of Respondent A. H. Robins Company, Incorporated.

No. 89-441

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Official Unsecured Creditors Committee (the "Committee") of A. H. Robins Company, Incorporated ("Robins"), respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fourth Circuit's opinion in this case. That opinion is reported at 880 F.2d 694.

REASONS FOR DENYING THE WRIT

A. Official Unsecured Creditors Committee Adopts Reasons for Denying Writ Set Forth in Brief of A. H. Robins Company, Incorporated.

The Official Unsecured Creditors Committee (the "Committee") of A. H. Robins Company, Incorporated ("Robins"), a respondent in this proceeding, joins with Robins in urging that petitioner's application for a writ of certiorari be denied. The Committee associates itself with the brief submitted by Robins, and submits this brief to set forth additional reasons of particular concern to the Committee, for the denial of petitioner's application.

B. Granting of Writ is Likely to Kill Robins' Reorganization Plan Involving Payment of All Estimated Dalkon Shield Claims and Other Debts of Robins.

The Committee represents lenders, trade suppliers, and other general unsecured creditors of Robins. These claims arose in the ordinary course of business and were unrelated to the Dalkon Shield product liability claims. It was, of course, the avalanche of Dalkon Shield claims that caused Robins to commence a Chapter 11 case, thereby necessitating that these unsecured claims await payment until consummation of a Chapter 11 plan of reorganization.

As a result of the impending acquisition of Robins by American Home Products Corporation ("AHP"), the Robins' plan of reorganization (the "Plan"), which has now been approved by the Bankruptcy Court and the District Court, and upheld by the Court of Appeals for the Fourth Circuit, achieves the remarkable result of paying in full all general unsecured claims and establishing a trust that the District Court found to be sufficient to pay in full all of the Dalkon Shield claims. When the Plan was submitted to a vote of the 195,000 Dalkon Shield personal injury claimants, 139,605 voted, of whom 131,761 (94.38%) voted in favor. Thus, a potentially tragic tale of endless litigation, with grave uncertainty concerning the availability of assets to satisfy the claims of nearly 200,000 Dalkon Shield claimants, is on the brink of a resolution.

The acquisition of Robins by AHP provides the funds for the settlement of the Dalkon Shield claims at full estimated value. Indeed, the amount made available to the personal injury claimants, by virtue of the acquisition of Robins by AHP, exceeds by approximately $750,000,000, the amount that would have been available to *all* unsecured creditors, including the Dalkon Shield claimants, if Robins were liquidated. Without the acquisition, and the resulting funding, a Plan providing full payment to creditors might never have emerged.

Of critical importance at this time is the fact that the agreement between AHP and Robins for the acquisition of Robins, and its subsequent merger into a subsidiary of AHP, expires on December 31, 1989, and if all appeals, including rehearing periods relating to the Plan, are not completed by that date, the acquisition and merger agreement may terminate in accordance with its express terms, along with the Plan that finally puts to rest one of the most serious mass tort episodes in our nation's history.

At this critical juncture, therefore, after years of extensive negotiation and litigation, this Plan is imperiled by virtue of petitioner's application for a writ of certiorari filed on behalf of fewer than 700 personal injury claimants, all of whose claims the District Court has found will be fully satisfied pursuant to the Plan. If the Plan is not consummated, it is likely to be years — if ever — before another plan of reorganization can be confirmed in the Robins Chapter 11 case, and there is no assurance that any future plan will again provide full payment to creditors.

Only an issue of transcendent importance should be permitted to derail the Plan that accomplishes so much for so many. For reasons fully explained in the Brief in opposition to the petition for writ of certiorari, filed by Robins, the Committee believes that the injunction provision of the Plan, the *sole* remaining point of objection, is not an issue of such dimension.

C. This Petition Should be Denied Regardless of the Court's Decision on the Contemporaneous Petition in *Anderson v. Aetna Casualty and Surety Company*.

Contemporaneously with the petition for writ of certiorari in this proceeding, a petition for writ of certiorari was filed in the "class action settlement" litigation, *Alexia Anderson v. Aetna Casualty and Surety Company* (89-442) ("*Anderson*"). The *Anderson* class action litigation involves a claim by Dalkon Shield claimants against Robins' insurer, Aetna Casualty and Surety Company ("Aetna"), that Aetna had conspired with certain individual defendants (including directors of Robins, and attorneys for Robins and Aetna) to damage the Dalkon Shield claimants. Neither the Committee nor Robins is a party to that litigation.

While expressing no opinion with regard to the petition in *Anderson*, the Committee takes this opportunity to emphasize to the Court that its decision with respect to the petition in this proceeding is in no way dependent on its decision with respect to the petition in *Anderson*. The petition in this proceeding should be denied regardless of the decision reached by the Court on the petition in *Anderson*.

The Plan does not require that the *Anderson* settlement be upheld in order for the merger and the Plan to be consummated. The Plan requires only that the *Anderson* settlement be approved by the District Court, but does not require that the settlement be upheld on appeal. Most importantly, the District Court found that the funding of the Plan, even without money from the *Anderson* settlement, was sufficient to pay all estimated Dalkon Shield claims in full.

The Plan operates independently of the class action litigation because it was carefully crafted to deal with the specific problems of Robins' liability to the Dalkon Shield claimants and its other creditors, regardless of whether the Court grants or denies the petition for writ of certiorari in *Anderson*. Indeed, the Plan expressly provides that it must be consummated upon denial of the petition for writ of certiorari in this case, even if the order of the District Court approving the class action

settlement is reversed or stayed pending appeal. Thus, if the Court denies the petition in this proceeding, the Plan will promptly be consummated. Funding will become available to pay the Dalkon Shield claims in an amount more than sufficient to pay the full amount of such claims as estimated by the District Court, and the general unsecured creditors represented by the Committee will be paid in full.

The Court's action on the *Anderson* petition will not affect the rights of any creditors or claimants in this proceeding. All creditors and claimants will be bound by the provisions of the Plan regardless of whether the class action settlement is upheld. If the petitioners in *Anderson* win the right to "opt-out" of the class that has been a party to the settlement, which is the sole relief they seek in *Anderson*, the exercise of that right would affect only their own case against Aetna. These claimants, if they "opt-out" of the class, might enlarge their opportunities with regard to Aetna, but their rights under the Plan would not be altered.

If, on the other hand, the Court denies the petition for certiorari in *Anderson*, or affirms the decision of the Court of Appeals, Aetna will provide additional cash and insurance for the payment of Dalkon Shield claims to provide even more funds for the satisfaction of such claims. In either event, the Plan, which is the subject of the petition in this proceeding, provides for payment to the Dalkon Shield claimants and other creditors in an amount greater than the value determined by the District Court even without any cash or insurance from *Anderson*.

It would be a grave injustice to all creditors of Robins, including the Dalkon Shield claimants, to have this painstakingly negotiated Plan, which has been approved by the overwhelming majority of claimants and creditors, frustrated by the petition for writ of certiorari in the *Anderson* class action proceeding, which has no bearing on the right of the parties to the Plan.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari to the Court of Appeals for the Fourth Circuit should be denied.

Dated: New York, New York
October 5, 1989

Respectfully submitted,

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ROSEMARY MENARD-SANFORD, *et al.*,
Petitioners

v.

A.H. ROBINS COMPANY, INCORPORATED, *et al.*,
Respondents.

BRIEF *AMICUS CURIAE* OF 18,136 DALKON SHIELD CLAIMANTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a corporate reorganization filed under the bankruptcy code to resolve mass tort product liability claims, where a consensual plan provides for full payment of all claims and a trust fund is judicially determined to be adequate for that purpose, a determination not appealed, may a challenge be heard to an injunction prohibiting claims against certain alleged joint tortfeasors, where the challenge rests on a contrary assumption that the fund will not be adequate?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROSEMARY MENARD-SANFORD, *et al.*,
Petitioners

v.

A.H. ROBINS COMPANY, INCORPORATED, *et al.*,
Respondents.

BRIEF *AMICUS CURIAE* OF 18,136 DALKON SHIELD CLAIMANTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICUS CURIAE

This opposition brief is filed on behalf of approximately 18,136 individuals who are qualified claimants in the A.H. Robins Company bankruptcy proceeding[1], asserting that each suffered personal injury from use of Robins' product, the Dalkon Shield intrauterine device. Since the Robins plan of reorganization approved by the district court will establish a trust fund of more than $2.375 billion to compensate these victims for their injuries, they have a direct and immediate

[1]The 18 attorneys and law firms who have agreed to sign this brief and whose names appear on its cover together represent more than 18,136 Dalkon Shield claimants residing in more than 20 nations, and have filed appropriate appearances either with the court below or with the Dalkon Shield Claimants Trust. In addition, those attorneys have been authorized to speak on behalf of approximately 1000 unrepresented members of the Dalkon Shield Victims' Association, Inc.

interest in final resolution of this proceeding, which has already delayed payment of their claims for more than four years.

By contrast, the petition for certiorari has been filed on behalf of only 669 individuals having similar claims, part of the small minority of disgruntled claimants who presumably voted against the consensual plan of reorganization in July 1988. Your *amicus curiae*[2] is part of the 94.3% of the Dalkon Shield claimants who voted in favor of the plan.

SUMMARY OF ARGUMENT

The overwhelming majority of the Dalkon Shield victims are not concerned about their theoretical right to sue some possible joint tortfeasor, nor even concerned about a possible "shortfall" in a trust fund of $2.375 billion established for their benefit. They seek to be compensated promptly for their injuries from the funds set aside for that purpose.

Greater than the risk of a shortfall is the immediate risk—a near certainty—that if the plan of reorganization is disapproved or even delayed further by a grant of certiorari, the offer to purchase the stock of Robins will be withdrawn, the plan will collapse, and the issue will become moot.

The issue of adequacy of the fund has not been properly preserved on appeal, and the record below provides no sufficient or useful basis for the Court to elucidate the issue presented by petitioners.

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[2]Consent to file as *amicus curiae* pursuant to Supreme Court Rule 36.1 has been secured in writing (filed with the Clerk of Court) from counsel of record for petitioners and for Robins, and verbally from counsel for the other respondents.

ARGUMENT

I.

The Robins Plan of Reorganization Is Acceptable to Nearly All of the Tort Claimants As A Reasonable Vehicle to Achieve Fair Compensation Without Undue Further Delay

The Robins plan of reorganization, while not perfect, has found overwhelming acceptance of all committees and of the primary parties to the bankruptcy as a means to preserve the corporation while assuring payment in full to the thousands of victims of the Dalkon Shield. The "claims resolution facility," the vehicle contained in the plan for ultimate disposition of thousands of personal injury claims, is largely the creature of the Dalkon Shield Claimants Committee constituted by the district court to represent the interests of all the IUD victims.

The small group of disenchanted claimants who seek to continue their challenge to the plan by petition to this Court would upset that careful scheme of mass claims resolution. If successful, they would cause incalculable further delay in disposition of the claims, and perhaps cause the return of tens of thousands of outstanding claims to courts throughout the United States and the world for disposition by individual trials.[3]

This brief *amicus curiae* is filed on behalf of the large majority of claimants who recognize that any plan of reorganization acceptable both to victims of the Dalkon Shield and to the

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[3]The petitioners are represented primarily by those few attorneys who have opposed the Robins bankruptcy from its inception in 1985, preferring to litigate individual claims in the courts in quest of substantial punitive damages. Although the present brief for practical purposes is signed only by attorneys each representing more than 150 claimants, there are nearly 10,000 additional attorneys who each represent one or a few clients, most of whom similarly view the bankruptcy plan as an appropriate tool for fair claims resolution and have chosen not to appeal.

financial and corporate community requires compromise. They are willing to give up a theoretical claim which might permit them to continue the litigation against some individuals and entities not truly central to the Robins liabilities[4] in return for assured—and prompt[5]—resolution of their claims under a program of alternate dispute resolution that appears to be fair and workable. Under the plan of reorganization, they will be able to proceed not only against the Dalkon Shield Claimants Trust, but should that fund prove inadequate (contrary to strong evidence), may also have some benefit from a separate fund of as much as $350 million to be established by Robins' insurer, Aetna Casualty and Surety Company.[6]

Significantly, the opponents of this plan of reorganization have *never* suggested an alternative plan which would promise a greater prospect of recovery. It is unrealistic to the point of absurdity to expect that tens of thousands of individual claimants, should this plan be upset, might pursue a potential

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[4]The plan does preserve certain rights against Robins' insurer (see Note 6, *infra*) and entails contributions from some corporate officers. It also perpetuates the right to sue physicians for independent medical malpractice. It only "channels" against the trust fund those claims which might give rise to a justified quest for indemnity from the bankrupt corporation.

[5]A number of the claimants have special need to conclude these proceedings promptly, since the "biological clock" is ticking on their infertility. They require early settlement of their claims in order to pay for restorative gynecological surgery or *in vitro* fertilization, which cannot be performed after a certain age. An emergency fund to be established for that purpose in 1987 was blocked on a prior appeal. 832 F.2d 299 (4th Cir. 1987), *cert. denied* 108 S. Ct. 1228 (1988).

[6]Settlement of the related Aetna class action is subject of a separate petition for certiorari (October Term, 1989, No. 442, *sub nom. Alexia Anderson, et al v. Aetna Casualty and Surety Company, et al*). Under the terms of the Robins plan, the Aetna class action settlement may be vacated without upsetting the viability of the plan or its claims resolution mechanism. Indeed, many of the signatories to this *Amicus Curiae* Brief support the petition for certiorari filed on behalf of Anderson, *et al.*

remedy in their local courts against the alleged joint tortfeasors.[7]

The majority of Dalkon Shield claimants opposing certiorari recognize a substantial risk that if the petition is granted, not only will they suffer further delay and further loss of interest on the trust funds (a loss estimated at nearly $20 million per month—more than $300 million since July 1988) but in all likelihood, they will lose the plan and the trust altogether. American Home Products has extended to December 31, 1989, its conditional commitment to purchase the stock of A.H. Robins Company for $3.2 billion. This purchase offer *exceeds* the value of Robins by any estimate.[8] It seems unlikely that the purchaser will tolerate the further delays and uncertainties of certiorari[9]; and therefore even should this Court affirm at some later date, the Robins plan is likley to be mooted before this Court has opportunity to consider its merits.[10] In that event, the claimants who have waited so long for compensation will certainly wait several more years, and most likely receive *less* compensation.

The overwhelming majority of claimants have stated their election to trade their uncertain opportunity to litigate in the

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[7]As *none* did prior to the bankruptcy; see Part III *infra*.

[8]This results from American Home's large cash surplus and the shelter of its income under the U.S. Tax Code.

[9]It was clear in the record below that the plan of reorganization was a unitary and non-severable whole. American Home Products would not have agreed to purchase the stock of Robins without an agreement to end all litigation by channeling all Dalkon Shield claims to the Trust for payment.

[10]The injunction at issue here remains a condition to the purchase agreement for Robins stock. If the purchase fails, Robins will again attempt "stand-alone" financing or experience liquidation, either of which almost certainly will bring less for the claimants and other creditors, after long delay, than is provided in the present plan.

future against some potential third parties for the certainties of what appears after adequate disclosure to be a good plan of reorganization and compensation. They entreat the Supreme Court to deny certiorari and permit the plan to proceed.

II.

Both From the Standpoint Of The Record Below, And From Developments Following Estimation, The Adequacy of the Fund is Undisputed.

Central to the contentions of the petitioners is a disputation over the adequacy of the fund of $2.375 billion to be made available under the Robins plan of reorganization from the American Home purchase. However, that issue has not previously been pressed on appeal, and is not properly before this Court.

In 1987 the district court conducted an estimation of claims under section 502(c) of the bankruptcy code (11 U.S.C. § 502(c)) and determined that at most, the Dalkon Shield claims had an aggregate settlement value of $2.475 billion based on the "historical value" of each claim. A random sampling of more than 6,000 claims had been carefully investigated and analyzed under the supervision of the court's special master, and expert witnesses were engaged by each of the parties to estimate the total value.

Following a week-long hearing in November 1987, the lower court expressly discounted the high estimate of approximately $7 billion proffered by the Claimants Committee as resting on faulty methods including an invalid assumption that all claims would be found equally meritorious, and rejected a low estimate of claims prepared by an expert for Robins. From the analyses prepared by each of the experts taken together, the trial court

concluded that $2.475 billion would suffice to pay all of the qualified Dalkon Shield victims "in full."[11]

Although voluminous evidence is available in the record from multiple parties and witnesses, the petitioners have not challenged the basis for the court's estimation, in this or any other forum. Instead, they continue to ground their challenge to the approved plan on speculation or unsubstantiated assertions that the "fund may well be inadequate" to pay the claimants in full. (Petition, p.3).[12]

Not only have the petitioners failed to challenge the court's express determination which undergirds their contentions, but subsequent events seem to have proven that their misgivings were unwarranted. The estimation experts (other than those called by the Claimants Committee) expressed an opinion that a significant portion of the original 330,000 Dalkon Shield claims would be found invalid or of minimal value. As of today, more than 135,000 of the claims have been disallowed and another 80,000 claimants have voluntarily accepted a "nuisance value" offer of a maximum of $725 to resolve their claims.[13] A third group of claims has been judged fatally deficient; and by the present projection of the Dalkon Shield Claimants Trust, less than 95,000 claims (or 28% of those filed in 1986) will remain

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[11]The trial judge repeatedly made it clear that his estimate of $2.475 million payable over a reasonable period of time (since converted by agreement to $2.375 billion payable by American Home immediately upon consummation) was the ***highest*** amount required to satisfy the Dalkon Shield claims consistent with credible evidence, and that all "risk" associated with the estimation itself would fall on the Robins Company, who subsequently was compelled to create a non-reversionary fund for the claimants.

[12]Indeed, the potential inadequacy of the fund is expressly posited as a component of the "question presented" in the petition.

[13]The court required Robins to provide funds to the Dalkon Shield Claimants Trust to resolve these small claims while appeals are pending from approval of the plan itself.

for analysis of medical records to determine what smaller portion will merit significant compensation.[14]

In short, the trial court's original estimate is looking better and better, and the fears of the alarmist minority first voiced when 330,000 claims were registered have already proven largely illusory.

Your *amicus curiae* has an interest equal to (or numerically far greater than) that of petitioners, to be assured that the victims' trust be adequate to provide full compensation to tens of thousands of remaining claimants. Undersigned counsel may have better information founded on representation of a significant number of individuals (a large percentage of the more serious claimants who have sought counsel). There is presently more reason than ever to believe that the valid claims will not likely "break the bank" but rather that a portion of the $2.375 billion fund may well remain for *pro rata* distribution (in lieu of punitive damages) under the terms of the claims resolution facility, after consideration and payment of all valid claims.

Petitioners complain that the "entire risk" of a shortfall in funding has been assumed by the Dalkon Shield victims under the agreed and approved plan. By their failure to appeal the court's finding that funding is sufficient, however, they cannot establish the magnitude nor even the fact of a supposed shortfall. The overwhelming majority of claimants—with their eyes open—prefer to face that "risk" rather than the certainty of continued delay, and the high probability that after that delay, no alternative plan will surface to provide better compensation for the victims of the Dalkon Shield than the existing consensual plan.

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[14]Some of these developments occurred after the district court confirmed the plan in July 1988 and may not be part of the record below.

III.

The Injunction Issue Does Not Present a Conflict Between the Circuits; and the Undeveloped Record in This Case Is a Poor Basis for Consideration of That Issue.

The sole issue raised in petitioners' brief involves the prohibition by the district court, continued in the plan of reorganization, barring Dalkon Shield victims who participate in the bankruptcy from claiming damages for the same injuries from possible third-party tortfeasors, specifically, from the officers and directors of A.H. Robins Company, from its attorneys and related parties.

The legal merits of this contention will be addressed in the briefs of the respondents. Suffice to say that the precedent cited by petitioners appears inapposite—the role of joint tortfeasors in a mass tort situation is unlike that of a corporate guarantor[15], and the claims of Internal Revenue Service have a statutory basis not available to the tort victims[16]. Moreover, in none of the cases cited was there a judicial determination (as here) that the debtor's funds were adequate to satisfy the creditors in full.

From a practical standpoint, in the context of this case your *amicus curiae* would respectfully suggest that the time for esoteric legal wrangling over the nuances of statutory interpretation of the bankruptcy code has long since passed. For reasons of fact, the issue seems moot or speculative in this case.

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[15]*See Union Carbide Corp. v. Newboles*, 686 F.2d 593 (7th Cir. 1982); and *Underhill v. Royal* 769 F.2d 1426 (9th Cir. 1985).

[16]*See United States v. Huckabee Auto Co.*, 783 F.2d 1546 (11th Cir. 1986).

It is certainly significant to note that in more than 9,000 lawsuits brought in state and federal courts of the United States prior to institution of the bankruptcy in 1985, not a single verdict was rendered against *any* of the individuals or entities now claimed to be joint tortfeasors with Robins. Moreover, the voluminous record of the district court itself reflecting often-weekly hearings over a period of three years fails to reflect a shred of substantial evidence bearing on the issue of liability of any of the alleged third-party tortfeasors. In the petition for certiorari itself, no facts are suggested either within or *dehors* the record of this case bearing on the supposed liability of any third parties.

Therefore, even should the Court find some abstract merit in the legal argument advanced by petitioners, that the bankruptcy code generally should be construed to permit creditors to recover from non-bankrupt parties sharing in a joint liability, this is certainly not the case to test or resolve that abstract issue in the situation of mass tort liabilities. The record is devoid of evidence of the identity of any such third parties, the nature and extent of their supposed liabilities, or the impact of perfection of such third-party claims on rehabilitation of the debtor. Absent evidence that petitioners will suffer harm from their inability to pursue third-party liabilities, the Court should not jeopardize a good plan of reorganization to indulge idle consideration of academic issues.[17]

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[17]This is particularly true since the plan expressly provides a source for virtually unlimited additional funds if the trust is exhausted, should the Court reverse the limitation of Aetna's liability in *Anderson v. Aetna*, No. 442. See *supra*, Note 6.

CONCLUSION

Petitioners' genuine issue — adequacy of the fund — is not pressed for appeal, and the issue presented is abstract and shapeless without definition in this record. More importantly, the very grant of certiorari would render the issue moot because it would destroy the plan.

The plan deserves a life; it has had the consistent support of a lopsided majority of each class of affected parties. A tiny minority of dissidents should not be permitted to drain this carefully wrought program of its blood, or to hold hostage the will and the benefit of the majority who have waited years for recompense.

For the reasons indicated, the petition for certiorari should be denied.

Respectfully submitted,

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TABLE OF AUTHORITIES

Cases: **Page:**

American Hardwoods, Inc. v. Deutsche Credit Corp.,
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MacArthur Co. v. Johns-Manville Corp.,
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1. At the center of the opposition of respondent A.H. Robins Company, Inc., to the petition are two assertions: there is adequate funding to pay all claimants in full, and the plan is a carefully constructed scheme of which the injunction barring suits against third parties is an essential component. The latter contention can be disposed of easily because it is, in essence, a plea for this Court to overlook an illegal provision in a reorganization plan if it is necessary to obtain approval of the debtor's officers who are the principal beneficiaries of the provision. However, it is Congress, not Robins or the courts, that decides which conditions may be included in reorganization plans, and hence if the injunction is illegal, it cannot stand no matter how vital its proponents believe it to be.

The full funding contention pervades Robins' opposition and takes various forms, including a suggestion that since *certiorari* is sought only on the legality of the injunction, petitioners have conceded that the funding is adequate. Not only is that argument wrong because petitioners have made no such concession, but it also misperceives the reason for our discussion of the inadequacy of the trust fund. The legality of the injunction does not depend on whether there is enough money to pay all claims in full. *See United States v. Huckabee Auto Co.*, 783 F.2d 1546 (11th Cir. 1986) (injunction set aside even though plan provides for full payment over 60 month period and all payments made on time). Rather, the funding issue is only relevant to explain why petitioners care about the injunction: to assure that all claimants are paid in full.

Although Robins insists that all victims will be fully compensated, its argument conveniently overlooks two facts that, like the 13th and 14th strokes of the clock, undermine all that comes before them. If funding were a certainty, why did Robins and American Home Products insist upon a cap on payments for the Dalkon Shield victims, instead of an open-ended provision as in the Manville reorganization, which places no limits on the right

of victims to receive compensation in full, albeit over an extended period of time? *See MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir.), *cert. denied,* 109 S. Ct. 176 (1988). Even more to the point, why did Robins, on behalf of its senior officials and its attorneys, insist on the injunction barring suits against third parties, to the point of making the injunction a condition to the consummation of the plan, unless there were a real likelihood of underfunding? Both questions, we submit, answer themselves and demonstrate that full funding is anything but the certainty that Robins claims it to be. Indeed, if full finding is as likely as Robins suggests, then the injunction is entirely unnecessary.

2. Despite Robins' efforts to avoid the conflict between this case and the rulings in other circuits, it has failed to point to any principled basis for distinguishing the result below from the other authorities cited by petitioners. In no other case, including the recent decision in *American Hardwoods, Inc. v. Deutsche Credit Corp.*, _F.2d __, No. 87-4438, 1989 U.S. App. LEXIS 13822 (9th Cir. Sept. 15, 1989), has a court of appeals allowed an injunction remotely similar to this one to be included in a reorganization plan. Indeed, *American Hardwoods*' transparently unsuccessful efforts to distinguish its refusal to permit an injunction against the non-debtors there from the Fourth Circuit's decision to allow a virtually identical order here, only underscores the unprecedented nature of the decision below and the need for this Court to review it.

Furthermore, the depth of the conflict is now more apparent as a result of the recent decision of the Eleventh Circuit in *Owaski v. Jet Florida Systems Inc.*, 883 F.2d 970 (1989). There the court of appeals adopted as its own the opinion of the district court which, relying on 11 U.S.C. § 524(e), allowed a former employee to sue the employer, which had undergone reorganization, for defamation, even though the employee could not collect against the company, but only from its insurance carrier. More-

over, it did so despite the recognition that the reorganized company might have to bear some of the expenses of litigation, unlike here where the Trust Fund will bear them all. It did so because it concluded that the purpose of section 524 "is to protect the debtor and not to shield third parties such as insurers who may be liable on behalf of the debtor." 883 F.2d at 975. Otherwise, third parties would escape potential liability and obtain a windfall, *id.* at 976, precisely what will happen here if the injunction stands.

3. Nor can the decision below be justified as a channeling injunction, proper under section 105 of the Bankruptcy Code. 11 U.S.C. § 105. Although the district court heavily relied on that theory, the court of appeals refused to adopt it, and quite properly so.

The proper use of section 105 and the concept of channeling injunctions is illustrated by *MacArthur*, *supra*. There, the Second Circuit upheld an order forbidding suits against an insurance company, which had already fully satisfied its obligation to the debtor as part of the reorganization plan, and directing (or channeling) all suits by victims against the bankrupt estate. But here, petitioners will not seek to satisfy any judgment from property belonging to Robins, and therefore the concept of channeling and the use of section 105 is wholly irrelevant. *See also American Hardwoods*, *supra* (discussing the limits of section 105).

4. The suggestion that even a grant of *certiorari* will end the plan is nothing short of rank speculation. While it is true that American Home Products has the right, despite all its efforts to date, to walk away from the merger with Robins if there is no final order by December 31, 1989, there is no evidence that it will do so. Indeed, it had a similar option this past July, but it voluntarily agreed to an extension of the closing date, and there is no basis to think that the situation has changed since then.

5. In the end, the basic plea of Robins and its three supporters

— none of whom filed a brief in the court of appeals — is a request that the Court disregard the law in the name of paying claimants at least a portion of their damages. But the law is not so malleable that it may be disregarded in the name of allegedly good intentions. Either bankruptcy courts have the power to bar suits against non-debtors in reorganizations, or, as every other court of appeals to consider the question has held, they do not. Either way, the issue is of vital importance in this and virtually every other corporate reorganization, and hence this Court should grant review to answer it in this proceeding.

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